

**COLORADO**  
**JURY INSTRUCTIONS**  

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**CIVIL**


**COLORADO**  
**SUPREME COURT COMMITTEE**  
**ON CIVIL JURY INSTRUCTIONS**

**2022 Edition**

**Volume 1**



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# COLORADO JURY INSTRUCTIONS

ISBN 978-1-731-92830-3

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### COLORADO SUPREME COURT COMMITTEE ON CIVIL JURY INSTRUCTIONS

2022 Edition

Volume 1

Chapters 1-15



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ISBN 978-1-731-92620-3

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## General Directions for Use

1. Rules 51.1 and 351.1 of the Colorado Rules of Civil Procedure state that in instructing the jury in a civil case, “the court shall use such instructions as are contained in Colorado Jury Instruction (CJI) as are applicable to the evidence and the prevailing law.” *See also Krueger v. Ary*, 205 P.3d 1150 (Colo. 2009) (a pattern instruction should be modified, or not used, if it does not reflect the prevailing law).

2. In using the instructions, keep in mind the following principles:

a. These instructions are neither a restatement nor an encyclopedia of the prevailing law. The intent is to provide forms of instructions for specific subjects that are frequently litigated.

b. These instructions are not all-inclusive. Where these instructions do not cover a relevant legal principle or the particular factual situation presented, the court shall instruct the jury as to the prevailing law applicable to the evidence in a manner that is clear, unambiguous, impartial, and free from argument, using these instructions as models as to the form so far as possible. *See C.R.C.P. 51.1(2); see also Gasteazoro v. Catholic Health Initiatives Colo.*, 2014 COA 134, ¶ 15, 408 P.3d 874, 878 (“A trial court may depart from CJI where ‘the factual situation or changes in the law warrant a departure from the CJI instructions.’ ”); *Short v. Kinkade*, 685 P.2d 210, 211 (Colo. App. 1983) (reversing trial court’s refusal to modify pattern instruction, although absence of Colorado precedent required that prevailing law be derived from secondary authority).

c. A compilation of these instructions is published annually, and reflects the law effective as of August 1 of the year preceding the edition date. To the extent the relevant law has been modified by statute or appellate decisions after this effective date, these instructions *must* be modified accordingly. *Short*, 685 P.2d at 211 (a “pattern jury instruction is intended as a model and will yield to prevailing law”).

d. So long as the court correctly instructs the jury on the law applicable to the evidence presented, the court retains broad discretion over the form and style of the instructions. *Patterson*

**v. BP Am. Prod. Co.**, 2015 COA 28, ¶ 67, 360 P.3d 211; **Krueger v. Ary**, 205 P.3d 1150, 1157 (Colo. 2009).

3. Generally, the instructions have been drafted in the singular. Names of the parties should be used wherever possible.

4. In many instances, alternatives have been included in parentheses or brackets. Where alternatives are indicated, the more appropriate one, in the light of the evidence and the theory of the case, should be used.

5. Notes on Use following each instruction contain cross-references, directions, and cautions with respect to the use of the instructions.

6. Each party is entitled to instructions as to that party's theory or theories of the case, if supported by the evidence. **Hansen v. State Farm Mut. Auto. Ins. Co.**, 957 P.2d 1380, 1384 (Colo. 1998).

7. With respect to each claim for relief, the jury should be instructed as to the elements of liability for such claim and the requirements to establish any applicable affirmative defenses.

8. The court may give identical copies of the instructions to each juror. However, only the original, and no copies, of the verdict forms should be submitted to the jury.

9. When the instructions are read or given to the jury, the title, Notes on Use, and Source and Authority must be omitted.

10. The pronouns used in these instructions may be modified to reflect the pronoun with which a party identifies, e.g., she/hers, he/his, they/them/theirs.

## **Colorado Rules of Civil Procedure Relating to Jury Instructions**

### **Rule 51. Instructions to Jury (District Court)**

The parties shall tender jury instructions pursuant to C.R.C.P. 16(g). All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on appeal or certiorari. Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence. Such instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as a part of the record of the cause.

### **Rule 16(g). Jury Instructions and Verdict Forms (District Court)**

Counsel for the parties shall confer to develop jointly proposed jury instructions and verdict forms to which the parties agree. No later than 7 days prior to the date scheduled for commencement of the trial or such other time as the court shall direct, a set of the proposed jury instructions and verdict forms shall be filed with the courtroom clerk. The first party represented by counsel to demand a jury trial pursuant to C.R.C.P. 38 and who has not withdrawn such demand shall be responsible for filing the proposed jury instructions and verdict forms. If any jury instruction or verdict form is disputed, the party propounding the instruction or verdict form shall separately file with the courtroom clerk a set of the disputed jury instructions and verdict forms. Each instruction or verdict form shall have attached a brief statement of the legal authority on which the proposed instruction or verdict form is based. Compliance with this Rule shall not deprive parties of the right to tender additional instructions or verdict forms or withdraw proposed instructions or verdict forms at trial. All jury instructions and verdict forms submitted by the parties shall be in final form and reasonably complete. The court shall permit the use of photocopied instructions and verdict forms, without citations, in its submission to the jury.

### **Rule 351. Instructions to Jury (County Court)**

(a) Any party may submit proposed jury instructions by filing



with the court two sets of proposed jury instructions and verdict forms. Both sets may be photocopies, but one copy of each instruction shall contain a brief statement of the legal authority on which the proposed instruction is based. The party submitting such instructions and forms shall, simultaneously with the filing of the jury instructions and forms, serve copies on all other appearing parties or their counsel of record.

(b) The parties shall make all objections to the instructions before they are given to the jury. Only the objections specified shall be considered on motion for post-trial relief or on appeal or certiorari. Before closing argument, the court shall read its instructions to the jury but shall not comment upon the evidence. The court's instructions may be taken by the jury when it retires. All instructions offered or given shall be filed with the clerk and, with the indorsement thereon indicating the action of the court, shall be taken as a part of the record of the cause.

### **Rules 51.1 and 351.1. Colorado Jury Instructions**

(1) In instructing the jury in a civil case, the court shall use such instructions as are contained in Colorado Jury Instruction (CJI) as are applicable to the evidence and the prevailing law.

(2) In cases in which there are no CJI instructions on the subject, or in which the factual situation or changes in the law warrant a departure from the CJI instructions, the court shall instruct the jury as to the prevailing law applicable to the evidence in a manner which is clear, unambiguous, impartial and free from argument, using CJI instructions as models as to the form so far as possible.



## **Statutes and Rules of Civil Procedure Governing Qualifications of Jurors**

### **Colorado Revised Statutes**

**§ 13-71-104. Eligibility for juror service—prohibition of discrimination.** (1) Juror service is a duty that every qualified person has an obligation to perform when selected.

(2) All trial and grand jurors shall be selected at random from a fair cross section of the population of the area served by the court. All selected and summoned jurors shall serve, except as otherwise provided in this article or by court rule.

(3)(a) No person shall be exempted or excluded from serving as a trial or grand juror because of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, economic status, or occupation.

(b) A person with a disability shall serve except:

(I) As otherwise provided in section 13-71-105 or 13-71-119.5;  
or

(II) Where the court finds that such person's disability prevents the person from performing the duties and responsibilities of a juror.

(c) Before dismissing a person with a disability pursuant to paragraph (b) of this subsection (3), the court shall interview the person to determine the reasonable accommodations, if any, consistent with federal and state law, that the court may make available to permit the person to perform the duties of a juror.

(4) The court shall strictly enforce the provisions of this article; except that the supreme court may provide by rule for the exclusion in a criminal trial of a juror who is employed by a public law enforcement agency or public defender's office.

**§ 13-71-105. Qualifications for juror service.** (1) Any person who is a United States citizen and resides in a county or lives in such county more than fifty percent of the time, whether or not registered to vote, shall be qualified to serve as a trial or grand juror in such county. Citizenship and residency status on the date that the jury service is to be performed shall control.

(2) A prospective trial or grand juror shall be disqualified, based on the following grounds:

(a) Being under the age of eighteen;

(b) Inability to read, speak, and understand the English language;

(c) Inability, by reason of a physical or mental disability, to render satisfactory juror service. Any person claiming this disqualification shall submit a letter, if the jury commissioner requests it, from a licensed physician, licensed physician assistant authorized under section 12-240-107(6), licensed advanced practice nurse, or authorized Christian science practitioner, stating the nature of the disability and an opinion that such disability prevents the person from rendering satisfactory juror service. The physician, physician assistant, licensed advanced practice nurse, or authorized Christian science practitioner shall apply the following guideline: A person shall be capable of rendering satisfactory juror service if the person is able to perform a sedentary job requiring close attention for three consecutive business days for six hours per day, with short breaks in the morning and afternoon sessions.

(d) Sole responsibility for the daily care of an individual with a permanent disability living in the same household to the extent that the performance of juror service would cause a substantial risk of injury to the health of the individual with a disability. Jurors who are regularly employed at a location other than their households may not be disqualified for this reason. Any person claiming this disqualification shall, if the jury commissioner requests it, submit a letter from a licensed physician, licensed physician assistant authorized under section 12-240-107(6), licensed advanced practice nurse, or authorized Christian science practitioner stating the name, address, and age of the individual with a disability, the nature of care provided by the prospective juror, and an opinion that the performance of juror service would cause a substantial risk of injury to the individual with a disability.

(e) Residence outside of the county with no intention of returning to the county at any time during the succeeding twelve months;

(f) Selection and service as an impaneled trial or grand juror in any municipal, tribal, military, state, or federal court within

the preceding twelve months or being scheduled for juror service within the next twelve months. Any person claiming this disqualification must submit a letter or other formal acknowledgment from the appropriate authority verifying his or her prior or pending juror service.

(g) Appearance as a prospective juror in state court in accordance with the provisions of section 13-71-120 within the current calendar year. Any person claiming this disqualification shall submit a letter or other formal acknowledgment from the appropriate authority verifying such prior juror appearance. This exemption, however, does not apply in emergency circumstances as provided for in section 13-71-112.

(3) A prospective grand juror shall be disqualified if he or she has previously been convicted of a felony in this state, any other state, the United States, or any territory under the jurisdiction of the United States.

**§ 13-71-119. Deferments and excuses—limitations.** (1) It shall be the policy of this article that every trial juror shall be prepared to serve three trial days except as otherwise provided in this section or in section 13-71-104, 13-71-105, or 13-71-119.5.

(2) The court or the jury commissioner may defer or advance the term of service of the trial or grand juror upon a finding as provided in section 13-71-104, 13-71-105, or 13-71-119.5. The court may excuse a juror from grand juror service upon a finding of hardship or inconvenience, taking into consideration the length of grand juror service. The court may excuse a juror from trial juror service upon a finding of extreme hardship. The court may dismiss a trial or grand juror at any time in the best interest of justice.

(3) The court, after a hearing, may excuse and discharge an impaneled juror prior to jury deliberation upon a finding of extreme hardship, and such discharge shall not be grounds for objection or a mistrial as long as the statutorily or constitutionally required number of jurors remain able to proceed with the trial and deliberation. The court, after a hearing, may excuse and discharge a juror participating in jury deliberation only upon a finding of an emergency or for any other compelling reason. If the statutorily or constitutionally required number of jurors does not remain to hear evidence or to participate in jury deliberation af-



ter the discharge of a juror, the trial may continue with the lesser number of jurors only upon agreement of all parties on the record. The court may discharge an impaneled juror who has not appeared for juror service upon a finding that there is a strong likelihood that an unreasonable delay in the trial would occur if the court were to await the appearance of the juror. The court may exercise any authority granted in this section at any time before or during a juror's term of service.

**§ 13-71-119.5. Persons entitled to be excused from jury service.**(1) The general assembly finds and declares that it is the policy of this state that all qualified citizens have an obligation to serve on juries when summoned by the courts of this state unless excused in accordance with the provisions of this article.

(2)(a)(I) A person shall be excused temporarily from service as a juror if his or her jury service would cause undue or extreme physical hardship to him or her or to another person under his or her direct care or supervision.

(II) The provisions of this subsection (2) shall apply notwithstanding the fact that the person does not have sole responsibility for the care of another person as described in section 13-71-105(2)(d).

(b) A judge or jury commissioner of the court for which a person was summoned for jury service shall determine whether jury service would cause the prospective juror or another person under his or her direct care undue or extreme physical hardship.

(c) A person who requests to be excused under this subsection (2) shall take all actions necessary to obtain a determination on the request before the date on which the person is scheduled to appear for jury duty.

(d) For purposes of this subsection (2), undue or extreme physical hardship shall be limited to circumstances in which a person:

(I) Would be required to abandon a person under his or her direct care or supervision because of the inability to obtain an appropriate substitute care provider during the period of jury service; or

(II) Would suffer physical hardship possibly resulting in illness or disease.



(e) A person who requests to be excused under the provisions of this subsection (2) may provide the judge or jury commissioner documentation that supports the request to be excused, including but not limited to medical statements, proof of dependency or guardianship, or other similar documents. The judge or jury commissioner may excuse a person if the documentation clearly supports the request to be excused. The documents comprising the documentation described in this subsection (2) shall not be deemed public records and shall not be disclosed to the public.

(2.5) A person who is breast-feeding a child and is temporarily unable to or chooses not to leave the child in order to serve on a jury must be excused temporarily from service as a juror for up to two consecutive twelve-month postponements. The judge or jury commissioner may request a medical statement in support of the postponement. A medical statement provided pursuant to this subsection (2.5) is not a public record and must not be disclosed to the public.

(3) A person who is temporarily excused pursuant to this section shall become eligible for qualification as a juror when the temporary excuse expires, as determined by the court. A person may be permanently excused only if the judge or jury commissioner determines that the grounds for being excused from jury service are permanent in nature.

(4) The provisions of this section shall not apply to impaneled jurors or to deliberating jurors described in section 13-71-119.

**§ 13-71-120. Length of juror service.** Trial juror service shall be for a one-day term unless a juror is assigned to or impaneled on an incompleated trial when the one-day term ends, or unless the court orders otherwise. Nothing shall prevent a trial juror from serving on more than one jury or participating in more than one trial during the term; except that a trial juror whose deliberation ended with a verdict shall not be required to participate in a second trial even though the juror may not have completed the first day of juror service at the time of the commencement of the second trial. Jurors awaiting assignment to a trial shall be discharged as early as possible after it has been determined that their services will not be needed. Grand juror service shall be for a term of twelve months unless the court discharges the jurors earlier or enlarges such term upon a find-

ing that the efficient administration of justice so requires; except that in no event shall a grand jury serve for longer than eighteen months.

**§ 13-71-121. Extended trials.** Before a jury is impaneled, the court shall inform the jurors if a trial is expected to last more than three trial days and may excuse a juror from performing juror service in that trial upon a finding of hardship or inconvenience, taking into account the expected length of the trial. Any juror so excused shall otherwise complete the term of juror service.

## **Colorado Rules of Civil Procedure**

### **Rule 47(b)–(e) (District Court)**

**(b) Alternate Jurors.** The court may direct that one or two jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall not be discharged until the jury renders its verdict or until such time as determined by the court. If the court and the parties agree, alternate jurors may deliberate and participate fully with the principal jurors in considering and returning a verdict. If one or two alternate jurors are called each side is entitled to one peremptory challenge in addition to those otherwise allowed. The additional peremptory challenge may be exercised as to any prospective juror.

**(c) Challenge to Array.** Any party may challenge the array of jurors by motion setting forth particularly the causes of challenge; and the party opposing the challenge may join issue on the motion, and the issue shall be tried and decided by the court.

**(d) Challenge to Individual Jurors.** A challenge to an individual juror may be for cause or peremptory.

**(e) Challenges for Cause.** Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror;

(2) Consanguinity or affinity within the third degree to any party;

## QUALIFICATIONS OF JURORS

(3) Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party, or being a member of the family of any party; or a partner in business with any party or being security on any bond or obligation for any party;

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation;

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action;

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.

### **Rule 347(b)–(e) (County Court)**

**(b) Alternative Jurors.** No alternate jurors shall be called or impaneled to sit on juries in the county court.

**(c) Challenge to Array.** A challenge to the array of jurors may not be made by either party.

**(d) Challenge to Individual Jurors.** A challenge to an individual juror may be for cause or peremptory.

**(e) Challenges for Cause.** Challenges for cause may be taken on one or more of the following grounds:

(1) A want of any of the qualifications prescribed by the statute to render a person competent as a juror.

(2) Consanguinity or affinity within the third degree to any party.

(3) Standing in the relation of guardian, ward, employer, employee, principal, or agent to any party, or being a member of the family of any party, or a partner in business with any party or being security on any bond or obligation for any party.

(4) Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action.

(5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except the interest of the juror as a member, or citizen of a municipal corporation.

(6) Having formed or expressed an unqualified opinion or belief as to the merits of the action.

(7) The existence of a state of mind in the juror evincing enmity against or bias to either party.



# **CHAPTER 1. GENERAL INSTRUCTIONS PRIOR TO OR DURING TRIAL AND UPON DISCHARGE OF JURY**

## **A. JURY ORIENTATION**

- 1:1 Introductory Remarks to Jury Panel
- 1:2 Explanation to Jury Panel of Voir Dire
- 1:3 Remarks to Jury Panel on Voir Dire
- 1:4 Jurors' Conduct During Trial—Pre-deliberation Discussions,  
Prohibition on Communications with Others
- 1:5 Jurors' Conduct During Trial—Prohibition on Outside  
Information and Electronic Communications
- 1:6 Pretrial Publicity
- 1:7 General Outline of Trial Procedures to Jury
- 1:8 Note-Taking by Jurors
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- 1:10 Admonition at Recess

## **B. INSTRUCTIONS DURING TRIAL**

- 1:11 Evidence Admissible for Particular Purpose Only
- 1:12 Stricken Evidence
- 1:13 Stipulation or Admission of A Fact
- 1:14 Stipulation Concerning Witness's Testimony
- 1:15 Directions Upon Authorized Jury View
- 1:16 Court's Questions to Witnesses
- 1:17 Questions by Jurors of Witnesses

## **C. DISCHARGE OF JURY**

- 1:18 Mandatory Instruction Upon Discharge

## **D. OATHS**

- 1:19 Oath on Voir Dire
- 1:20 Oath of Jurors
- 1:21 Oath or Affirmation of Witnesses
- 1:22 Oath of Interpreter
- 1:23 Oath of Bailiff on Retirement of Jury

## A. JURY ORIENTATION

### 1:1 INTRODUCTORY REMARKS TO JURY PANEL

*(The remarks of the Court to the members of the jury panel at the commencement of the trial should be substantially as follows:)*

**Members of the jury, this is** *(insert appropriate description, e.g., "Courtroom A," "Division II," etc.)* **of the (County) (District) Court. My name is** *(insert name)*. **I am the judge assigned to preside in this case.**

**First, I want to tell you about the rules that will govern your conduct during your jury duty, beginning right now, even if you are not finally selected as jurors. If you are chosen as jurors, your job will be to decide this case based solely on the evidence presented during the trial and the instructions that I will give you. You will not be investigators or researchers, so do not attempt to gather any information about this case on your own. Do not read or do research about this case or the issues in the case from any other source, including the Internet. You may not use Google, Bing, Yahoo, or any other type of Internet search engine to learn about any person, place, or thing that is involved in this case. Do not read about this case in newspapers, magazines, or any other publications. Do not listen to any podcasts or television or radio broadcasts about the trial. Do not consult dictionaries; medical, scientific, or technical publications; religious books or materials; or law books. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes all social networking sites, Google, Wikipedia, blogs, and other websites.**

**If you were to violate this rule by receiving outside information about the case, it could force me to declare a mistrial, meaning that the trial would have to start over, and all of the parties' work, my work, and your work on this case would be wasted.**

Therefore, it is very important that you not receive outside information about this case, whether it comes from other people, from the media, from books or publications, or from the Internet. You are free to use the Internet, but only for purposes unrelated to this case. Do not search for or receive any information about the parties, the lawyers, the witnesses, the judge, the evidence, or any place or location mentioned. Do not research the law. Do not look up the meaning of any words or scientific or technical terms used. If necessary, I will give you definitions of words or terms.

Also, you are not allowed to visit any place(s) involved in this case. If you normally travel through such a place, you should try to take a different route until I tell you that your jury service is completed. If you cannot take a different route, you must not stop or attempt to gather any information from that location.

Until I tell you that your jury service is complete, do not communicate about the case with anyone, including family and friends, whether in person or by telephone, cell phone, smart phone, computer, Internet, or any Internet service. This means you must not email, text, instant message, Tweet, blog, or post information about this case, or about your experience as a juror on this case, on any social networking site, website, listserv, chat room, or blog.

When court is not in session, you may communicate about anything other than this case. You may tell others that you are on jury duty and that you cannot talk about this duty until your service is completed, and you may tell them the estimated schedule of your jury duty, but do not tell them anything else about the case. If anyone tries to communicate with you about anything concerning the case, you must stop the communication immediately and report it to the Bailiff, who will notify me.



**(The Court) (I) will now introduce you to this case.**

**The case which we are about to try is a civil case and not a criminal case. The (party) (parties) who started this case (is) (are) called (the) plaintiff(s). The opposing (party) (parties) (is) (are) called (the) defendant(s). (If there are additional parties, describe them and their role.) In this case the plaintiff(s) (is) (are) (insert name[s]), and the defendant(s) (is) (are) (insert name[s]). (Insert statement about the nature of the case.)**

**There will be (insert number) jurors in this case. The jury will consider the evidence and reach a verdict with the help of instructions about the law. (The Court) (I) will now read you some of the instructions that may apply in this case. These are preliminary instructions about the law and may not be exactly the same as the final instructions about the law you will be given at the end of the case to use in your deliberations. If there is any difference between the preliminary and final instructions, you must follow and be governed by the final instructions in deciding the case. You should not be concerned about any difference between the preliminary instructions and the final instructions. (Insert applicable jury instructions, such as the definition of the burden of proof and any applicable evidentiary standards.)**

**The jury must decide what the facts are from the evidence you hear and see during the trial.**

**You have a duty to be fair and impartial.**

**In this case, the parties are entitled to a jury trial. Trial by jury is part of our American system of justice. Each juror plays an equal and important part in this system. It is your duty to give this case your close attention, absolute fairness, and good judgment.**

**We estimate that this trial will last (insert number) days. (The Court may either at this time or later inquire**



*whether there are any members of the jury panel who would be unable to serve during the trial if selected as jurors.)*

**You will not be required to stay together at noon or at night until the case is finally given to you for your decision.**

### Notes on Use

1. This instruction should be appropriately modified and given in conjunction with other applicable instructions in this chapter and Chapters 2 and 3 to comply with the provisions of C.R.C.P. 47(a)(2)(IV) or 347(a)(2)(IV). These rules require that the jury be informed before jury selection of the nature of the case by use of the parties' statement of the case, *see* Instructions 2:1, 2:2, or 2:3, or by use of "a joint statement of factual information intended to provide a relevant context for prospective jurors to respond to questions asked of them." C.R.C.P. 47(a)(2)(IV), 347(a)(2)(IV). In the court's discretion, the attorneys may present that information with short non-argumentative statements.

2. The preliminary jury instructions are to inform prospective jurors of their duties and to facilitate the intelligent exercise of challenges. C.R.C.P. 47(a), 347(a). They should include at a minimum instructions on the burden of proof, credibility of witnesses, objections of counsel, and bench conferences. C.R.C.P. 47 cmt.

3. In proceedings under the Children's Code, Instruction 40:1 (Juvenile Delinquency) or Instruction 41:1 (Dependency and Neglect) should be used rather than this instruction.

4. In other cases the Court's remarks should be changed or modified to suit the exigencies of the case. The above is a suggestion as to what the remarks should cover. The jury plays a vital role in the trial and should be kept fully informed of the judicial procedures as the trial progresses.

5. When this instruction is used in a will contest case, *see* Chapter 34, the ninth paragraph of this instruction must be appropriately modified. For example:

The case we are about to try is a civil case as distinguished from a criminal case. It involves the validity of a will. The parties to the case are the proponent, (*name*), who is the party offering the will for probate, and the contestant, (*name*), who is the party objecting to the admission of the will to probate. The proponent, (*name*), claims the will was validly executed by (*name of alleged testator*), as the testator. The contestant, (*name*), claims the will should not be admitted to probate because (*name of alleged testator*) (*insert brief description, e.g.,*

*“did not execute the will in the manner required by law,” “was not of sound mind at the time the will was executed,” “had revoked the will before she died,” etc.).*

6. This instruction should be modified to reflect current communication methods and information-gathering technology.

### **Source and Authority**

This instruction is supported by C.R.C.P. 47(a) and 347(a), and the Source and Authority to Instruction 1:5.

## 1:2 EXPLANATION TO JURY PANEL OF VOIR DIRE

**(The Court) (I) want(s) to explain briefly to you the method we will use in selecting this jury and some of the reasons for this procedure.**

**(Insert number) members of the panel will be called into the jury box. After the first (number) members of the panel are in the jury box, each of you, regardless of whether you have been called forward to sit in the jury box, will take your oath that you will truthfully answer all questions as to whether you can serve as a juror in this case. After the oath is (administered) (given), (the Court) (I) and each attorney may ask you questions concerning your ability to be fair and impartial jurors. You should answer fully all questions asked by the attorneys or by (the Court) (me). Even though you may not be called forward into the jury box with the first group called, please listen closely to all that is said because you may be asked to sit in the jury box before jury selection is completed. After the questioning has been completed, each side must excuse (insert number) members of the panel without stating a reason. This leaves a jury of (insert number) to try the case. Therefore, do not be embarrassed or consider it any reflection upon you if you are one of those excused.**

*(The Court should then introduce each attorney and request each attorney to introduce their respective clients. The Court should also introduce to the panel all the members of the court staff and describe briefly the functions they perform. The appropriate number of prospective jurors should then be called by lot and the oath on voir dire administered to the entire panel, thus avoiding needless duplication in the administration of the oath.)*

*(After the members initially called have been seated in the jury box, the Court should then continue:)*



**I will now explain why a person cannot serve on a jury.**

**A person cannot serve on a jury if he or she** *(insert the grounds for disqualification in § 13-71-105(2), C.R.S., set out at the beginning of this Chapter).*

**A juror may also be excused for any of the following reasons:** *(insert for civil cases the grounds in C.R.C.P. 47(e) or 347(e) set out at the beginning of this Chapter; for juvenile delinquency cases, insert the grounds set out in Crim. P. 24(b)).*

**It is your duty to volunteer any information that may disqualify you from jury service or might be a reason to excuse you from service, whether or not you are specifically asked about this information. Is there anything which any of you know or think would disqualify you as a juror or which would be reasons for excusing you in this case? If so, would you please raise your hand?** *(Thereafter, as other members of the jury panel may be called to the jury box, a similar question should be put to the prospective juror.)*

#### **Notes on Use**

1. This instruction should be appropriately modified and given in conjunction with other applicable instructions in this Chapter and Chapters 2 and 3 to comply with the provisions of C.R.C.P. 47(a) or 347(a).

2. In general, four peremptory challenges are allowed in district courts and one is allowed in county courts. *See* C.R.C.P. 47(g) & (h), 347(g) & (h).

3. Allowing a civil litigant fewer peremptory challenges than authorized, or than available to and exercised by the opposing party, does not by itself require automatic reversal. **Laura A. Newman, LLC v. Roberts**, 2016 CO 9, ¶ 26, 365 P.3d 972 (overruling **Blades v. DaFoe**, 704 P.2d 317 (Colo. 1985); **Safeway Stores, Inc. v. Langdon**, 187 Colo. 425, 532 P.2d 337 (1975); and **Denver City Tramway Co. v. Kennedy**, 50 Colo. 418, 117 P. 167 (1911), all of which supported automatic reversal). Instead, the reviewing court must apply an outcome-determinative analysis, which asks whether the error substantially influenced the outcome of the case. *Id.*

4. Although juvenile delinquency cases are to be conducted gener-



ally as criminal proceedings, see Source and Authority to Instruction 40:1, this instruction should be used in such cases. See C.R.J.P. 3.5(b) (“Examination, selection, and challenges for jurors [in delinquency cases] shall be as provided by C.R.C.P. 47, except that the grounds for challenge for cause shall be as provided by Crim. P. 24.”).

5. Inclusion of a judge’s spouse as a juror does not merit automatic reversal as either structural error or plain error. **Richardson v. People**, 2020 CO 46, ¶¶ 31–37, 481 P.3d 1 (in the absence of a contemporaneous objection, the presence of the judge’s spouse on the jury did not create structural error as the judge did not have a duty to sua sponte excuse his spouse from the jury or to recuse himself).

### Source and Authority

This instruction is supported by C.R.C.P. 47(a) and 347(a).

**1:3 REMARKS TO JURY PANEL ON VOIR DIRE**

*(After the jury panel has been sworn and the initial panel has been seated in the jury box, the following remarks are recommended.)*

**The attorneys and (the Court) (I) want(s) an impartial jury to decide this case. (The Court) (I) will be asking questions to find out whether any (prospective) juror knows any of the parties, witnesses or court personnel, whether he or she has any knowledge or personal interest in the outcome of the case or whether he or she has any bias or prejudice which might wrongfully influence the juror. No question is intended to pry into your personal affairs. If you are not chosen, it is not a reflection on your character nor does it mean that the attorney has anything personally against you. If you know or at any time during questioning you become aware of anything which might prevent you from being completely impartial to both sides, or might otherwise prevent you from serving as a juror, you should immediately raise your hand.**

*(The Court should proceed with voir dire examination.)*

**Notes on Use**

1. This instruction should be appropriately modified and given in conjunction with other applicable instructions in this chapter and Chapters 2 and 3 to comply with the provisions of C.R.C.P. 47(a) or 347(a).

2. Should it appear that a prospective juror is hesitant to answer questions or answer them fully because of their personal nature, the judge, along with counsel, may conduct the voir dire examination of the prospective juror as to such matters in chambers.

3. During voir dire, counsel has the right to ask whether any of the prospective jurors has a relationship to the defendant's insurance company and, if so, to inquire into the nature of that relationship. **Smith v. District Court**, 907 P.2d 611 (Colo. 1995).

**Source and Authority**

This instruction is supported by C.R.C.P. 47(a) and 347(a).

# **1:4 JURORS' CONDUCT DURING TRIAL—PRE- DELIBERATION DISCUSSIONS, PROHIBITION ON COMMUNICATIONS WITH OTHERS**

Members of the Jury, now that you have been sworn to try this case, I will instruct you as to your conduct during the course of this trial.

You may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present.

You must not, individually or as a group, discuss or form final opinions about any fact or about any potential outcome of this case until after you have heard and considered all of the evidence, the closing arguments of the lawyers, and the final instructions I will give you on the law. Keep an open mind during the trial. Form your final opinions only after you have discussed this case as a group in the jury room at the end of the trial.

Do not talk with anyone else about this case, including your family and friends, the parties, their attorneys, witnesses, representatives of the media, or court staff, until this trial is over and you have been formally discharged by the Court. At that time, you will be free to discuss this case with anyone if you wish to do so; you simply must not do so before the trial is over and you have been formally discharged by the Court.

If anyone tries to talk with you or if you overhear others talking about any party, witness, evidence, or anything else about this case, walk away and immediately notify the Bailiff, who will notify me. Also, do not read or listen to any accounts or discussions of the case that may be reported by newspapers or other publications or by television or by radio.

### Notes on Use

C.R.C.P. 47(a)(5) allows for discussion of the evidence by the jury throughout the trial with appropriate instructions. However, the trial court retains “the discretion to prohibit or limit pre-deliberation discussions of the evidence in a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case.”

### Source and Authority

This instruction is supported by C.R.C.P. 47(a)(5).



## **1:5 JURORS' CONDUCT DURING TRIAL— PROHIBITION ON OUTSIDE INFORMATION AND ELECTRONIC COMMUNICATIONS**

As jurors, your job is to decide this case based solely on the evidence presented during the trial and the instructions that I will give you. You are not investigators or researchers, so you must not read or use any other material of any kind to obtain information about the case or to help you decide the case. This prohibition applies, for example, to: newspapers; magazines; television and radio broadcasts; dictionaries; medical, scientific, or technical publications; religious books or materials; law books; and the Internet. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes all social networking, Google, Wikipedia, blogs, and other websites.

If you were to violate this rule by receiving outside information about the case, it could force me to declare a mistrial, meaning that the trial would have to start over before a different jury, and all of the parties' work, my work, and your work on this trial would be wasted.

Therefore, it is very important that you not receive outside information about this case, whether it comes from other people, from the media, from books or publications, or from the Internet. You are free to use the Internet, but only for purposes unrelated to this case. Do not search for or receive any information about the parties, the lawyers, the witnesses, the judge, the evidence you will hear, or any place or location mentioned during the trial. Do not research the law. Do not look up the meaning of any words or scientific or technical terms used during the trial. If necessary, I will give you definitions of words or terms before you begin your deliberations.

Also, you are not allowed to visit any place(s)

involved in this case. If you normally travel through such a place, you should try to take a different route until I tell you that your jury service is completed. If you cannot take a different route, you must not stop or attempt to gather any information from that location.

Until I tell you that your jury service is completed, do not communicate with anyone, including family and friends, about the evidence or the issues in this case. This prohibition applies to all forms of communication, including in-person conversations, written communications, telephone or cell phone calls, and electronic communications through any device. For example, you must not communicate about this case by email, text messages, Twitter, blogging, or social media like Facebook.

When court is not in session, you may communicate about anything other than this case. You may tell others that you are on a jury and that you cannot talk about the trial until it is over, and you may tell them the estimated schedule of the trial, but do not tell them anything else about the case. If anyone tries to communicate with you about anything concerning the case, you must stop the communication immediately and report it to the Bailiff, who will notify me.

#### Notes on Use

In some circumstances, the trial court may choose to repeat this instruction or an abbreviated version of it before recesses during trial and as a part of the final instructions to the jury. *See* Instructions 1:10 and 4:1A.

#### Source and Authority

This instruction is supported by **People v. Harlan**, 109 P.3d 616 (Colo. 2005) (improper for text from Bible to be used in jury deliberations); **People v. Wadle**, 97 P.3d 932 (Colo. 2004) (improper for juror to download Internet information on the use of anti-depressants and share it during deliberations); **Wiser v. People**, 732 P.2d 1139 (Colo. 1987) (improper for juror to look up legal terms in dictionary during delibera-

tions); **Niemand v. District Court**, 684 P.2d 931 (Colo. 1984) (improper for juror to use law dictionary); **Alvarez v. People**, 653 P.2d 1127 (Colo. 1982) (improper for juror to use dictionary to augment understanding of words used in court's instructions); **Vento v. Colorado National Bank-Pueblo**, 907 P.2d 642 (Colo. App. 1995) (improper for jurors to research legal terms in dictionary); **People v. Cornett**, 685 P.2d 224 (Colo. App. 1984) (improper for jurors to read newspaper article relating to the case); **T.S. v. G.G.**, 679 P.2d 118 (Colo. App. 1984) (improper for juror to consult textbook and use the information during jury deliberations to assess expert testimony); and **People v. Reed**, 42 Colo. App. 275, 598 P.2d 148 (1979) ("experiment" by juror to determine length of time required to drive certain distance, assuming improper, held harmless). *See also* **Kendrick v. Pippin**, 252 P.3d 1052 (Colo. 2011) (not improper for juror who was engineer to use preexisting knowledge of math and physics to perform calculations about the speed, location, and reaction times of a party).

**1:6 PRETRIAL PUBLICITY**

**There may have been some publicity about this case in the newspapers and on radio and television. Some of this publicity may have come to the attention of some of you. You must disregard anything that you may have heard about this case outside the courtroom. Your verdict must be based solely on evidence admitted during the trial.**

**Notes on Use**

When this cautionary instruction is appropriate to the circumstances of the case, it should be given immediately after Instruction 1:4. If necessary, however, it may also be given during trial.

**Source and Authority**

1. This instruction is supported by **Harper v. People**, 817 P.2d 77 (Colo. 1991).
2. This instruction is comparable to COLORADO JURY INSTRUCTIONS—CRIMINAL C:14 (2018).



## 1:7 GENERAL OUTLINE OF TRIAL PROCEDURES TO JURY

(The Court) (I) will now explain the procedure that is usually followed during a trial. Before the trial begins, (the Court) (I) will orally give you some preliminary instructions (, including some specific instructions on the law that applies in this case,) (and definitions of [technical] [special] terms) to provide you with a framework for the evidence that will be presented. (You will also receive copies of these preliminary instructions [and definitions].)

The attorneys will then have the opportunity to present opening statements. The purpose of opening statements is to give you an outline of each party's claims and defenses. You must remember, however, that what is said in opening statements and all other statements made by the attorneys are not evidence. Your verdict must be based upon the evidence in this case and the instructions regarding the law that governs this case. The evidence usually consists of the sworn testimony of witnesses, the exhibits which are received and any facts which are admitted or agreed to or are judicially noticed.

(Also, during the course of this trial, [I] [the Court] [the attorneys] will [make] [read] brief statements summarizing the evidence already presented [and outlining how this evidence relates to evidence that will be presented later in the trial]. These statements are not evidence and are only made for the purpose of assisting you in understanding this case.)

Once the trial begins, the plaintiff's attorney will present evidence. The defendant's attorney is permitted to cross-examine all witnesses presented by the plaintiff. Upon the conclusion of the plaintiff's case, the defendant's attorney may offer evidence on behalf of the defendant, but is not required to do so. If the defendant presents witnesses (in response to the

plaintiff's evidence or to establish any defense), the plaintiff's attorney may cross-examine them. The plaintiff's attorney may choose to present further evidence in response to any evidence presented by the defendant.

After all the evidence has been received, (I) (the Court) will give you final instructions on the law applicable to this particular case. These final instructions will replace the preliminary instructions which you will be given before the trial begins. Based upon the evidence presented, the final instructions may differ from the preliminary instructions. If there is any difference between the preliminary and final instructions, you must follow and be governed by the final instructions in deciding the case.

After you have received all the instructions on the law governing this case, each attorney may present a final argument to you. The plaintiff's attorney will first present (his) (her) closing argument. Thereafter, the defendant's attorney will make a closing argument. The plaintiff's attorney may respond to any statements made by the defendant's attorney. After arguments are concluded, the case will be given to you for decision.

It is the right of an attorney to object when testimony or other evidence is offered which the attorney believes is not admissible.

When (I) (the Court) sustain(s) an objection to a question, the jurors must disregard the question and must draw no conclusion from the question nor guess what the witness would have said. If any answer has been given, the jurors must disregard it.

When (I) (the Court) sustain(s) an objection to any evidence or strike(s) any evidence, the jurors must disregard that evidence.

When (I) (the Court) overrule(s) an objection to

**any evidence, the jurors must not give that evidence any more weight than if the objection had not been made. You should not be prejudiced against any party because that party's attorney makes an objection.**

**Legal arguments are occasionally required to be considered outside the presence of the jury. This may cause delay. All rulings (I) (the Court) (am) (is) required to make will be based solely on the law. You must not infer from any ruling or from anything (I) (the Court) say(s) during trial that (I) (the Court) hold(s) any views either for or against any party to this case.**

**During recesses and adjournments of court, you will be free to separate, to eat lunch, and to go home at the end of the day. During these times, you are not to discuss this case with one another or anyone else. Furthermore, you must not talk with any of the parties to this case, their attorneys, witnesses, or representatives of the media until after you have reached your verdict and have been discharged by the Court as jurors in this case.**

**We have a Bailiff, (*name*), and (he) (she) is here to take care of your needs during the course of this trial. Do not discuss this case with the Bailiff. If you have any personal problems or needs, take it up with (*name of Bailiff*) and (he) (she) will notify me.**

#### **Notes on Use**

1. This instruction should be appropriately modified to include the information required by C.R.C.P. 47(a)(5) or 347(a)(5), including a detailed statement of applicable instructions, case specific legal principles, and definitions of technical or legal terms that may be used during trial.

2. This instruction should be modified appropriately when necessary for cases involving counterclaims, etc.

3. In juvenile delinquency or dependency and neglect proceedings, Instructions 40:2 and 41:2, respectively, should be used rather than this instruction.



4. Use whichever parenthesized words are appropriate.

5. The “Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries,” adopted in principle by the Colorado Supreme Court in February 1997, recommends:

The parties and their counsel should consider the use of interim summaries for the jury after discrete segments of especially long trials or trials in unusually complex cases. The parties shall confirm that they have considered the use of interim summaries.

*Id.* at p. 46, ¶ 18.

### Source and Authority

This instruction is supported by C.R.C.P. 47(a)(5) and comment, and C.R.C.P. 347(a)(5).



**1:8 NOTE-TAKING BY JURORS**

**You have received writing materials. You may use these materials to take notes during the trial. However, you are not required to do so.**

**If you take notes, you should not allow the note-taking to detract from your close attention to each witness and his or her testimony and all other evidence received during the trial.**

**Take notes sparingly. Do not try to summarize all testimony. (For example, notes can be particularly helpful when dealing with measurements, times, distance, identities and relationships.)**

**Whether you take notes or not, you should rely on your memory as much as possible and not upon your notes or the notes of other jurors. Any notes you take are to refresh your own individual memory.**

**These materials may only be used in the courtroom or jury room. You may take these materials from the courtroom to the jury room and from the jury room to the courtroom. However, these materials may not be taken anywhere else.**

**Please write your name on your materials. Be assured that no one else will read your notes. At the end of the case, these notes will be returned to the Court and destroyed.**

**Notes on Use**

1. When Instruction 1:9 is given with this instruction, the last two paragraphs of this instruction should not be given.

2. The "Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries," adopted in principle by the Colorado Supreme Court in February 1997, recommends:

The trial judge should instruct jurors in all cases that jurors are entitled to take notes during the trial if they wish.

*Id.* at p. 45, ¶ 17.

### Source and Authority

This instruction is supported by C.R.C.P. 47(m) and (t) and C.R.C.P. 347(m) and (t).

## 1:9 JUROR NOTEBOOKS

To assist you in understanding these proceedings, you have been provided with notebooks containing information about this case. Please write your name in these notebooks. These notebooks may only be used in the courtroom or jury room. You may take these notebooks from the courtroom to the jury room and from the jury room to the courtroom. However, they may not be taken anywhere else. Any notes that you have taken during the trial will be destroyed after they have been returned to the Court.

### Notes on Use

1. Instruction 1:8 should be given with this instruction.

2. The “Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries” (Report), adopted in principle by the Colorado Supreme Court in February 1997, recommends:

The courts should provide juror notebooks in both civil and criminal cases, which contain information on trial proceedings, copies of judge’s instructions, copies of important exhibits, lists of witnesses, and other information appropriate for the case.

*Id.* at p. 42, ¶ 16.

3. The Report further recommends that the notebooks contain the following information: (1) an explanation of the nature of the case being tried; (2) trial procedures; (3) housekeeping matters; (4) a diagram of the courtroom with the positions and names of all the participants labeled; (5) preliminary jury instructions; (6) a list of actual witnesses; (7) a list of actual exhibits; (8) admitted exhibits or exhibits the court allows the jury to have; (9) excerpts from important exhibits; (10) a glossary of technical and scientific terms; (11) a glossary of legal terms; (12) limiting instructions given during the trial; (13) final instructions; (14) blank paper for juror notes with an instruction on how they are to be utilized; and (15) any other items agreed upon by the court and counsel. *Id.* at pp. 43-44; *see also* C.R.C.P. 47 cmt.

4. The Report also recommends that “[n]otebooks should be used in all cases of any complexity or length[,]” and that these notebooks should include “paper for juror notes with an instruction as to how they are to be utilized.” Report at pp. 43-44; *see* Instruction 1:8.

5. Citing this instruction and Instruction 1:8, the court in **People**



**v. Willcoxon**, 80 P.3d 817, 820 (Colo. App. 2003), *overruled on other grounds by People v. Adams*, 2016 CO 74, 384 P.3d 345, held that although the error was not structural, the trial court erred by allowing jurors in criminal trial to take juror notebooks home with them “because this procedure is not expressly authorized by Crim. P. 16(IV)(f).”

### Source and Authority

This instruction is supported by C.R.C.P. 47(m) and (t) and C.R.C.P. 347(m) and (t). *See also* C.R.C.P. 16(f)(3)(VI)(C) and C.R.C.P. 316(e).

**1:10 ADMONITION AT RECESS**

We will now (recess for the day) (have a recess) (and the Bailiff will escort you to the jury room). You may discuss the evidence during the trial, but only among yourselves and only in the jury room when all of you are present.

You must not discuss this case with anyone else, or read, view, or listen to any reports about this case in the press, on radio, or on television.

Remember what I told you at the beginning of the case: do not look at, read, consult, or use any material of any kind, including any newspapers, magazines, television and radio broadcasts, dictionaries, medical, scientific, technical, religious, or law books or materials, the Internet, or any material of any type or description in connection with your jury service. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes all social networking, Google, Wikipedia, blogs, and other websites. Do not do any research of any kind about this case.

Do not use any information from any other source concerning the facts or the law applicable to this case other than the evidence presented and the instructions that I give you. Do not do your own investigation about this case. (You are not allowed to visit any place[s] mentioned in the evidence. If this is an area that you normally go through, you should try to take an alternate route. If you are not able to take an alternate route you should not gather any information from that location.)

You must not form or express any opinion on the outcome of the case until it is given to you for your final decision.

**Attorneys and parties are ordered not to talk with you. Please do not consider them impolite when they do not talk to you.**

### Notes on Use

1. Use whichever parenthesized portions are appropriate.
2. C.R.C.P. 47(a)(5) allows for discussion of the evidence by the jury throughout the trial with appropriate instructions. However, the trial court retains “the discretion to prohibit or limit pre-deliberation discussions of the evidence in a particular trial based on a specific finding of good cause reflecting the particular circumstances of the case.” C.R.C.P. 47(a)(5).
3. In some circumstances, the trial court may choose to give Instruction 1:5 with this instruction.

### Source and Authority

1. This instruction is supported by C.R.C.P. 47(a)(5) and 347(a)(5).
2. This instruction is comparable to COLORADO JURY INSTRUCTIONS—CRIMINAL C:13 (2018).



**B. INSTRUCTIONS DURING TRIAL****1:11 EVIDENCE ADMISSIBLE FOR PARTICULAR PURPOSE ONLY**

In certain instances evidence may be admitted for a limited purpose only. (Exhibit [*insert identification*]) (Witness [*name*]'s testimony [you are about to hear] [you have just heard]) is such an instance. It may be used as evidence for the purpose of showing (*insert description*), but you should not consider it as evidence for any other purpose.

**Notes on Use**

1. This instruction should be given immediately before or immediately after evidence received for a limited purpose is admitted, using whichever parenthesized phrases are appropriate.

2. A limited-purpose instruction need be provided only when requested. **Qwest Services Corp. v. Blood**, 252 P.3d 1071 (Colo. 2011). “It is a fundamental rule of trial practice, long established in Colorado, that when evidence is admissible for one purpose and not another, the burden is upon counsel opposing the admission of the evidence to object and request limitations on its admission.” **Polster v. Griff’s of Am., Inc.**, 184 Colo. 418, 421-22, 520 P.2d 745, 747 (1974).

**Source and Authority**

1. This instruction is supported by CRE 105, and **Blood**, 252 P.3d at 1087.

2. This instruction is modeled after COLORADO JURY INSTRUCTIONS—CRIMINAL D:02 (2018). See also **Lannon v. Taco Bell, Inc.**, 708 P.2d 1370 (Colo. App. 1985), *aff’d on other grounds*, 744 P.2d 43 (Colo. 1987).

**1:12 STRICKEN EVIDENCE**

**The (testimony) (or) (evidence) offered by (name of witness) as to (description of fact in issue) has been rejected by this Court and is stricken. You are not to consider for any purpose any offer of evidence that is rejected or stricken. Such (testimony) (or) (evidence) is to be treated as if you had never (heard) (or) (seen) it.**

**Notes on Use**

Use whichever parenthesized words are appropriate.

**Source and Authority**

1. This instruction is supported by **Vigil v. People**, 731 P.2d 713 (Colo. 1987).

2. This instruction is comparable to COLORADO JURY INSTRUCTIONS—CRIMINAL D:04.5 (2018).

**1:13 STIPULATION OR ADMISSION OF A FACT**

**You have heard (the parties stipulate or agree to the existence of a fact) (or) (that a fact has been admitted). This (agreement) (admission) makes the presentation of any evidence to prove this fact unnecessary. The (agreement) (admission) means that you must accept this fact (these facts) as true.**

**Notes on Use**

Use whichever parenthesized words are appropriate.

**Source and Authority**

This instruction is supported by C.R.C.P. 36(b).

**1:14 STIPULATION CONCERNING WITNESS'S  
TESTIMONY**

**The attorneys have agreed to what (*name*) would have testified to if (he) (she) were here. You are to treat this testimony the same as any other witness.**

**Source and Authority**

This instruction is supported by C.R.C.P. 16(f)(3)(I) and 36(b).



**1:15 DIRECTIONS UPON AUTHORIZED JURY  
VIEW**

**The Court has concluded that you should now view** *(insert appropriate description of the subject or scene)* **as a group, and you are to go with the Bailiff(s). While you are there or in transit do not discuss this case among yourselves and do not ask any questions of the attorneys or of the people who may be there. The purpose of the viewing is to assist you in understanding and applying the testimony you hear and the exhibits introduced at this trial.**

**Notes on Use**

Views are not permitted in civil trials in county courts, C.R.C.P. 347(k), but are permitted in district court trials. C.R.C.P. 47(k).

**Source and Authority**

1. This instruction is supported by C.R.C.P. 47(k).
2. This instruction is modeled after COLORADO JURY INSTRUCTIONS—CRIMINAL C:09 (2018).

**1:16 COURT'S QUESTIONS TO WITNESSES****No instruction to be given.****Note**

Questions by judges are not encouraged, but if a judge deems it necessary to ask a question or line of questions, the judge should instruct the jury immediately before asking the question or questions as follows:

I am going to direct (a) (one or more) question(s) to the witness. You are not to assume that I hold any opinion on the matter concerning my question(s). Remember that any witness's answer to any question that I may ask is of no greater value and of no greater weight than any other answer that may be given. Attorneys may object to my question and you should not be prejudiced against any party because (his) (or) (her) attorney makes an objection.

**Source and Authority**

The instruction suggested in the Note is modeled after COLORADO JURY INSTRUCTIONS FV—CRIMINAL C:03 (2018).

## 1:17 QUESTIONS BY JURORS OF WITNESSES

Rules governing jury trials do not allow jurors to ask questions orally of a witness. If you do have a question you would like to ask a witness during the trial, write your question down, but do not sign it. (Use the same procedure for any follow-up questions.) If you have a question for a witness, signal the Bailiff or me before the witness leaves the stand.

I may discuss the question with the lawyers. If I decide the question is proper, I will ask it at the appropriate time. Keep in mind, however, that the rules of evidence or other rules of law may prevent me from asking certain questions. I will apply the same legal standards to your questions as I do to the questions asked by the lawyers.

If I do not ask a particular question, do not guess why or what the answer might have been. My decision not to ask a question is not a reflection on the person asking it, and you should not attach any significance to my decision.

### Notes on Use

1. If a juror's question is objectionable because of the form of the question, but is otherwise appropriate, it should be rephrased. **People v. Zamarripa-Diaz**, 187 P.3d 1120 (Colo. App. 2008) (better practice is for trial judge to consult with counsel before asking juror questions).

2. The court has discretion to allow juror follow-up questions in writing. C.R.C.P. 47(u).

### Source and Authority

This instruction is supported by C.R.C.P. 47(u) and 347(u).

**C. DISCHARGE OF JURY****1:18 MANDATORY INSTRUCTION UPON  
DISCHARGE**

**This case has now been concluded and (I) (the Court) wish(es) to express (my) (its) appreciation to you for your services.**

**You may now talk to anyone, including the attorneys and parties, about this case. Whether you do so is entirely up to you.**

**If you decide not to discuss the case, your decision will undoubtedly be respected. However, if an attorney or a party persists in discussing the case over your objection, or becomes critical of your services as a juror, please report the incident to me.**

**You are now allowed to leave with the thanks of the Court.**

**Notes on Use**

The Court should not express any opinion as to its agreement or lack of agreement with the jury's verdict.



## **D. OATHS**

### **1:19 OATH ON VOIR DIRE**

**Do you, and each of you, solemnly swear (by the everliving God) or affirm to answer fully and truthfully the questions asked by the Court or the attorneys concerning your service as a juror in this case and to volunteer fully any information concerning your ability to render a just verdict?**

#### **Notes on Use**

The Colorado Rules of Civil Procedure do not specifically require an oath for voir dire, although an oath is traditional and is implied in C.R.C.P. 47(a) and 347(a). Under section 24-12-101, C.R.S., the phrase "by the everliving God" is allowed but not required in an oath.

#### **Source and Authority**

This instruction is supported by C.R.C.P. 47(u) and 347(u).

**1:20 OATH OF JURORS**

**Do you, and each of you, solemnly swear (by the everliving God) or affirm that you will fairly consider and decide the case now before you between *(name[s])*, the plaintiff(s), and *(name[s])*, the defendant(s) and that you will reach a true verdict based upon the evidence and the law contained in the instructions of the Court?**

**Notes on Use**

1. C.R.C.P. 47(i) and 347(i), respectively, provide that the district courts and county courts shall administer an oath to the jurors which in substance should say: "That you and each of you will well and truly try the matter at issue between \_\_\_\_\_, the plaintiff, and \_\_\_\_\_, the defendant, and a true verdict render according to the evidence."

2. Under section 24-12-101, C.R.S., the phrase "by the everliving God" is allowed but not required in an oath.

**Source and Authority**

This instruction is supported by C.R.C.P. 47(i) and 347(i).

**1:21 OATH OR AFFIRMATION OF WITNESSES**

**Do you solemnly (swear) (by the everliving God) (affirm), under penalty of perjury, that the testimony you will give before this Court shall be the truth, the whole truth, and nothing but the truth?**

**Notes on Use**

1. An affirmation, rather than an oath, may be administered under section 13-90-117, C.R.S., which provides:

**Affirmation—form—perjury.** (1) A witness who desires it, at his option, instead of taking an oath may make his solemn affirmation or declaration by assenting when addressed in the following form:

“You do solemnly affirm that the evidence you shall give in this issue (or matter), pending between \_\_\_\_\_ and \_\_\_\_\_ shall be the truth, the whole truth, and nothing but the truth.”

(2) Assent to this affirmation shall be made by answer: “I do.”

(3) A false affirmation or declaration is perjury in the first degree.

2. This instruction must be modified to read, “Do you promise to tell the truth?” for “any child who testifies in any proceeding pursuant to section 13-90-106(1)(b)(II)” (child under ten in any civil or criminal proceeding for sexual abuse, sexual assault, or incest). § 13-90-117.5, C.R.S.

3. Under section 24-12-101, C.R.S., the phrase “by the everliving God” is permitted but not required for an oath.

**Source and Authority**

1. This instruction is supported by CRE 603, which requires that an oath or affirmation be “administered [to a witness] in a form calculated to awaken his conscience and impress his mind with his duty to [testify truthfully].”

2. In addition to section 13-90-117, C.R.S., see sections 18-8-501 to -509, C.R.S. (perjury and related offenses).

**1:22 OATH OF INTERPRETER**

**Do you solemnly (swear) (by the everliving God) (affirm) under penalty of perjury that you will, to the best of your ability, accurately translate into the (*insert description*) language, the oaths that are administered and the questions asked the witness(es) in this case, and that you will accurately translate into the English language the answers to those questions to the best of your ability?**

**Notes on Use**

1. Before an interpreter is allowed to interpret, the Court may first have to make or permit a preliminary inquiry into the interpreter's qualifications to serve. *See* CRE 604 (interpreters must be qualified as experts and swear or affirm to the making of a true translation).

2. Concerning interpreters for hearing impaired persons, *see* §§ 13-90-201 to -210, C.R.S., and for appropriate modifications to be made in this instruction in such cases, *see* section 13-90-207, C.R.S.

3. Under section 24-12-101, C.R.S., the phrase "by the everliving God" is permitted but not required for an oath.

**Source and Authority**

This instruction is supported by CRE 604 and section 13-90-117, C.R.S.



**1:23 OATH OF BAILIFF ON RETIREMENT OF JURY**

**Do you solemnly (swear) (by the everliving God) (affirm) under penalty of law that you will keep these jurors together in a private place; that you will not speak to them about any aspect of this trial nor allow any other person to do so, except to ask the jurors if they have agreed on a verdict; and that when the jurors have agreed upon a verdict, you will return with them into court?**

**Notes on Use**

Under section 24-12-101, C.R.S., the phrase "by the everliving God" is permitted but not required for an oath.

## CHAPTER 2. STATEMENT OF THE CASE TO BE DETERMINED

- 2:1 Liability in Issue—No Counterclaim
- 2:2 Liability in Issue—Counterclaim
- 2:3 Liability in Issue—Third-party Complaint
- 2:4 Admitted Liability
- 2:5 Directed Verdict as to Liability—Damages Only in Issue—  
General
- 2:6 Directed Verdict as to Liability—Damages Only in Issue—  
Negligence

### 2:1 LIABILITY IN ISSUE—NO COUNTERCLAIM

(The Court) (I) will now explain the claims and defenses of each party to the case and the law governing the case. Please pay close attention to these instructions. These instructions include both general instructions and instructions specific to the claims and defenses in this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law (, as you are now instructed,) to the facts as you find them to be.

**The parties to this case are:** *(name)*, the plaintiff and *(name)*, the defendant.

**The plaintiff claims:** *(state the essential elements of the claim using simple language based on the pleadings, evidence and the pretrial order and avoiding use of technical terms and words such as “allege” or “contend.” Each statement should include reference to time, place and circumstances).*

**The defendant admits** *(describe briefly the admitted facts, if any)*. **The defendant denies** *(describe briefly the defendant’s position regarding plaintiff’s claims)*. **As (an) affirmative defense(s), the defendant claims** *(describe briefly the defendant’s affirmative defense[s]).*

## These are the issues you are to decide.

### Notes on Use

1. This instruction should be appropriately modified or supplemented to comply with C.R.C.P. 47(a)(2)(IV) and (V). *See also* C.R.C.P. 47 cmt.
2. The statement of the case should not include the amount of damages sought by any party. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974).
3. In a district court case, if the parties have stipulated pursuant to C.R.C.P. 48 that the verdict will be by some stated majority rather than by unanimous vote, the first paragraph of this instruction should be modified accordingly, for example, "You must arrive at your verdict by majority vote, with not less than 4 of your 6 members agreeing, applying the law, as you are now instructed, to the facts as you find them to be."
4. Use only those sentences in the fourth paragraph which are appropriate.
5. In cases in which the defendant has given notice under section 13-21-111.5(3)(b), C.R.S., that a designated nonparty may be wholly or partially at fault under section 13-21-111.5(2) for having caused the plaintiff's claimed damages, the fourth paragraph of this instruction must be appropriately modified to include that claim and provide an appropriate identification of the nonparty.
6. In dependency and neglect proceedings, Instruction 41:4 should be used rather than this instruction.

### Source and Authority

This instruction is supported by C.R.C.P. 47(a)(2)(IV) and 347(a)(2)(IV).

**2:2 LIABILITY IN ISSUE—COUNTERCLAIM**

(The Court) (I) will now explain the claims and defenses of each party to the case and the law governing the case. Please pay close attention to these instructions. These instructions include both general instructions and instructions specific to the claims and defenses in this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law (, as you are now instructed,) to the facts as you find them to be.

Each party to this action claims to be entitled to damages from the other. The parties to this case are: (name), the plaintiff and (name), the defendant.

**The plaintiff claims:** *(state the essential elements of the claim using simple language based on the pleadings, evidence, and the pretrial order, and avoiding use of technical terms and words such as “allege” or “contend.” Each statement should include reference to time, place and circumstances).*

**The defendant admits** *(describe briefly the admitted facts, if any).* **The defendant denies** *(describe briefly the defendant’s position regarding plaintiff’s claims).* **As an affirmative defense, the defendant claims** *(describe briefly the defendant’s affirmative defense[s]).*

**As a counterclaim against the plaintiff, the defendant further claims:** *(state the essential elements of the counterclaim).*

**As to the counterclaim, the plaintiff admits** *(describe briefly the admitted facts, if any).* **The plaintiff denies** *(describe briefly the plaintiff’s position regarding defendant’s claims).* **As an affirmative defense, the plaintiff claims** *(describe briefly the plaintiff’s affirmative defense[s]).*

**These are the issues you are to decide.**



### Notes on Use

1. This instruction should be appropriately modified or supplemented to comply with C.R.C.P. 47(a)(2)(IV) and (V). *See also* C.R.C.P. 47 cmt.

2. The Notes on Use to Instruction 2:1 are also applicable to this instruction.

### Source and Authority

This instruction is supported by C.R.C.P. 47(a)(2)(IV) and 347(a)(2)(IV).

## 2:3 LIABILITY IN ISSUE—THIRD-PARTY COMPLAINT

(The Court) (I) will now explain the claims and defenses of each party to the case and the law governing the case. Please pay close attention to these instructions. These instructions include both general instructions and instructions specific to the claims and defenses of this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law (, as you are now instructed,) to the facts as you find them to be.

The parties to this case are: *(name)*, the plaintiff, *(name)*, the defendant, who is also the third-party plaintiff, and *(name)*, the third-party defendant.

**The plaintiff claims:** *(state the essential elements of the claim using simple language based on the pleadings, evidence and the pretrial order, and avoiding use of technical terms and words such as “allege” or “contend.” Each statement should include reference to time, place, and circumstances).*

**The defendant admits** *(describe briefly the admitted facts, if any)*. **The defendant denies** *(describe briefly the defendant’s position regarding plaintiff’s claims)*. **As an affirmative defense, the defendant claims** *(describe briefly the defendant’s affirmative defense[s])*.

**As a third-party claim against the third-party defendant, *(name)*, the defendant, *(name)*, who is also the third-party plaintiff, further claims:** *(state the essential elements of the third-party claim, using simple language based on the pleadings, evidence and the pretrial order and avoiding use of technical terms and words such as “allege” or “contend.” Each statement should include reference to time, place and circumstances).*

**The third-party defendant, *(name)*, admits** *(describe briefly the admitted facts, if any)*. **The third-party defen-**

**dant denies** (*describe briefly the third-party defendant's position regarding the third-party plaintiff's claims*). **As an affirmative defense, the third-party defendant claims** (*describe briefly the third-party defendant's affirmative defense[s]*).

**These are the issues you are to decide.**

#### **Notes on Use**

1. This instruction should be appropriately modified or supplemented to comply with C.R.C.P. 47(a)(2)(IV) and (V). *See also* C.R.C.P. 47 cmt.
2. The Notes on Use to Instruction 2:1 are also applicable to this instruction.
3. When stating the claims and defenses of the parties in the latter part of this instruction, the actual names of the parties should be used with or without their party designations as seems necessary to avoid confusion.
4. This instruction should be used only in district courts where, under C.R.C.P. 14, the joinder of third-party defendants is allowed. There is no comparable rule in county courts.

#### **Source and Authority**

This instruction is supported by C.R.C.P. 47(a)(2)(IV) and 347(a)(2)(IV).

## 2:4 ADMITTED LIABILITY

The defendant, *(name)*, has admitted legal liability for any injury and damages the plaintiff, *(name)*, may have suffered that were caused by *(describe specific occurrence)*. The only issues remaining for the jury to determine are the nature and extent of injury, if any, and the amount of damages, if any, caused by *(describe specific occurrence)*.

The fact that the defendant has admitted that (he) (she) (it) was (negligent) (at fault) must not influence how you decide the remaining issues.

### Notes on Use

1. If inappropriate, omit the parenthetical phrases “if any.”
2. If the admitted liability relates to a counterclaim or third-party claim, this instruction should be modified accordingly.
3. This instruction should also be appropriately modified if the defendant alleges that the plaintiff has failed to mitigate his or her damages, *see* Instruction 5:2, or if the defendant has alleged aggravation of a preexisting condition, *see* Instruction 6:8.
4. This instruction should be used only when the defendant has admitted sole responsibility for the plaintiff’s injuries.

### Source and Authority

This instruction is supported by **Foster v. Phillips**, 6 P.3d 791 (Colo. App. 1999) (where defendant admitted duty and breach of that duty, it was appropriate to instruct jury that defendant was liable as a matter of law for the damages suffered by plaintiff).



## 2:5 DIRECTED VERDICT AS TO LIABILITY— DAMAGES ONLY IN ISSUE—GENERAL

(The Court) (I) will now explain the claims of each party to the case and law governing the case. Please pay close attention to these instructions. You must all agree on your verdict, applying the law (, as you are now instructed,) to the facts as you find them to be.

The parties to this case are: *(name)*, the plaintiff, and *(name)*, the defendant.

**The plaintiff claims:** *(state the essential elements of the claim, using simple language based on the pleadings, evidence and the pretrial order, and avoiding use of technical terms and words such as “allege” or “contend.” Each statement should include reference to time, place and circumstances).*

**The defendant claims:** *(describe the defendant’s denials as to those issues of fact on which the Court is not directing a verdict).*

(The Court) (I) (has) (have) determined as a matter of law that *(describe those facts which the Court is directing the jury to find).*

Because (the Court) (I) (has) (have) found these facts to be true, the only matter(s) remaining for you to decide (is) (are): *(describe those facts on which the Court is not directing a verdict and which remain in dispute).*

The Court’s decision that the defendant *(insert appropriate description, e.g., “breached the contract,” etc.)* should not influence you in deciding (this) (these) remaining issue(s).

### Notes on Use

1. See the first two Notes on Use to Instruction 2:1.
2. Use whichever parenthesized portions are appropriate.

### Source and Authority

1. This instruction is supported by C.R.C.P. 47(a)(2)(IV) and 347(a)(2)(IV).

2. As to when the court may properly direct a verdict as to any or all of the issues of liability, see **CeBuzz, Inc. v. Sniderman**, 171 Colo. 246, 249-50, 252-53, 466 P.2d 457, 458, 460 (1970), holding that it was proper to direct a verdict on the issues of negligence and proximate cause where, when viewing the evidence in the light most favorable to the party against whom the motion was made, the evidence was not only undisputed but reasonable minds could draw only one reasonable conclusion, that is, negligence; where “neither the evidence nor the inferences deducible therefrom are in dispute, and the measure of the defendant’s duty is clearly defined, the issues of negligence and proximate cause become . . . issues of law.” See also **Thompson v. Tartler**, 166 Colo. 247, 443 P.2d 365 (1968) (directed verdict proper) (quoting and reaffirming rules of **Blount v. Romero**, 157 Colo. 130, 401 P.2d 611 (1965), and **Bates v. Stagg**, 157 Colo. 456, 459, 404 P.2d 530, 531 (1965) (viewing the evidence most favorable to the defendant, “it is only in the clearest of cases, where the facts are undisputed and reasonable minds could draw but one inference from them, that the question of just what constitutes reasonable care is ever one of law to be taken from the jury and decided by the court.”)).

## **2:6 DIRECTED VERDICT AS TO LIABILITY— DAMAGES ONLY IN ISSUE—NEGLIGENCE**

(The Court) (I) will now explain the claims of each party to the case and the law governing the case. Please pay close attention to these instructions. You must all agree on your verdict, applying the law, as you are now instructed, to the facts as you find them to be.

The parties to this case are: *(name)*, the plaintiff, and *(name)*, the defendant.

The plaintiff claims that on *(insert date)*, *(he)* *(she)* *(it)* had *(injuries)* *(damages)* *(losses)* caused by the negligence of the defendant.

The defendant has denied that the plaintiff had any *(injuries)* *(damages)* *(losses)* caused by the negligence of the defendant.

The (Court) (I) *(have)* *(has)* decided that the defendant was negligent in that *(he)* *(she)* *(it)* *(insert description of conduct which the Court has determined constitutes negligence as a matter of law)*.

In view of this decision the only matters remaining for you to decide are:

1. Did the plaintiff have *(injuries)* *(damages)* *(losses)* caused by the negligence of the defendant?

2. If so, what is the total amount of damages that the plaintiff had that were caused by the negligence of the defendant?

The Court's decision that the defendant was negligent should not influence you in determining either of these two issues.

### Notes on Use

1. The Notes on Use to Instruction 2:5 are also applicable to this instruction.

2. When this instruction is given, the appropriate instruction or instructions relating to cause (Instructions 9:18 – 9:21) should also be given.

3. If the court is directing a verdict not only on the issue of negligence but also on the issue of whether or not the plaintiff sustained injury as a result of such negligence, this instruction should be appropriately modified.

4. Whenever this instruction would be applicable to the defendant's conduct, but there is also sufficient evidence of comparative negligence on the plaintiff's part, the instruction, along with the appropriate comparative negligence instructions (Instructions 9:26 – 9:28D), must be appropriately modified. Also, in a comparative negligence case, if the court directs a finding or verdict of negligence against one or more of the parties, the court must also instruct the jury as to the conduct on which such finding is based as well as any other conduct the jury could reasonably find constituted negligence, in order to permit the jury to make a proper comparison of such negligence with any negligence of other parties the jury may find. **Ricklin v. Smith**, 670 P.2d 1239 (Colo. App. 1983).

### Source and Authority

This instruction is supported by C.R.C.P. 47(a)(2)(IV) and 347(a)(2)(IV).



## **CHAPTER 3. EVIDENCE**

### **A. BURDENS OF PROOF**

- 3:1 Burden of Proof and Preponderance of Evidence—Defined
- 3:2 Clear and Convincing Evidence—Defined
- 3:3 Reasonable Doubt—Defined
- 3:4 No Speculation

### **B. PRESUMPTIONS AND PARTICULAR INFERENCES**

- 3:5 Permissible Inference Arising From Rebuttable Presumption
- 3:5A Inference Arising From Invocation of Fifth Amendment Privilege
- 3:6 Statutory Presumptions That Shift the Burden of Proof
- 3:7 Constructive Knowledge Based on Duty to Inquire

### **C. WEIGHING OF EVIDENCE**

- 3:8 Evidence in The Case—Stipulations—Judicial Notice—Inferences Permitted and Defined
- 3:9 Direct and Indirect (Circumstantial) Evidence—Defined
- 3:10 Depositions as Evidence
- 3:11 Testimony Read From Transcript
- 3:12 Preponderance Not Determined by Number of Witnesses
- 3:13 Adverse Inference From the Loss or Destruction of Evidence
- 3:14 Sympathy—Prejudice
- 3:15 Expert Witnesses
- 3:16 Determining Credibility of Witnesses
- 3:17 Highlighted Exhibits

**A. BURDENS OF PROOF****3:1 BURDEN OF PROOF AND PREPONDERANCE  
OF EVIDENCE—DEFINED**

1. The plaintiff has the burden of proving (his) (her) (its) claim(s) by a preponderance of the evidence.

2. The defendant has the burden of proving (each of) (his) (her) (its) affirmative defense(s) by a preponderance of the evidence.

3. To prove something by a “preponderance of the evidence” means to prove that it is more probably true than not.

4. “Burden of proof” means the obligation a party has to prove (his) (her) (its) claim(s) or defense(s) by a preponderance of the evidence. The party with the burden of proof can use evidence produced by any party to persuade you.

5. If a party fails to meet (his) (her) (its) burden of proof as to any claim or defense or if the evidence weighs so evenly that you are unable to say that there is a preponderance on either side, you must reject that claim or defense.

**Notes on Use**

1. If there is no affirmative defense, omit paragraph 2.
2. If there is a counterclaim, and no affirmative defense, omit the words “affirmative defense” in paragraph 2 and substitute the word “counterclaim.”
3. If there is an affirmative defense and counterclaim, add in paragraph 2 the words “and counterclaim” following the words “affirmative defense.”
4. Generally, in all civil cases, the burden of proof “shall be by a preponderance of the evidence,” except as to claims for exemplary damages for which the facts supporting such relief must be proved “beyond

a reasonable doubt.” § 13-25-127, C.R.S. Also, in some cases, *see, e.g.*, Instructions 22:1, 22:2, 35:1, 35:2, some elements of a claim may have to be established by “clear and convincing evidence.” *See* Instruction 3:2. If so, this instruction must be modified accordingly as to such elements and Instruction 3:2 defining “clear and convincing evidence” must also be given. Concerning the constitutionality of section 13-25-127, *see* **Page v. Clark**, 197 Colo. 306, 592 P.2d 792 (1979).

5. Proof “by a preponderance of the evidence” demands only that the evidence must “preponderate over, or outweigh, evidence to the contrary.” **City of Littleton v. Indus. Claim Appeals Office**, 2016 CO 25, ¶ 38, 370 P.3d 157, 168-69.

6. In cases in which a party is asserting a claim for punitive damages, *see* Instruction 5:4, and consequently the supporting facts for such relief must be established “beyond a reasonable doubt,” this instruction must be appropriately modified, and Instruction 3:3, defining “reasonable doubt,” must also be given.

### Source and Authority

This instruction is supported by section 13-25-127. *See also* **People v. Garner**, 806 P.2d 366 (Colo. 1991); **Kaiser Found. Health Plan v. Sharp**, 741 P.2d 714 (Colo. 1987); **Swaim v. Swanson**, 118 Colo. 509, 197 P.2d 624 (1948); **Sams Automatic Car-Coupler Co. v. League**, 25 Colo. 129, 54 P. 642 (1898).

### 3:2 CLEAR AND CONVINCING EVIDENCE— DEFINED

A fact or proposition has been proved by “clear and convincing evidence” if, considering all the evidence, you find it to be highly probable and you have no serious or substantial doubt.

#### Notes on Use

1. Generally, in all civil cases the burden of proof “shall be by a preponderance of the evidence,” except as to claims for exemplary damages for which the facts supporting such relief must be proved “beyond a reasonable doubt.” § 13-25-127, C.R.S. Also in some cases, *see, e.g.*, Instructions 22:1, 22:2, 35:1 and 35:2, some or all the issues may have to be established by clear and convincing evidence. When some of the issues must be so determined, this instruction must be given with Instruction 3:1 and the language of Instruction 3:1 must be modified to indicate which issues must be established by “clear and convincing evidence” as contrasted to “preponderance of the evidence.” Concerning the constitutionality of section 13-25-127, *see Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The standard set out in this instruction of “clear and convincing evidence” should be used by the court when determining under section 13-21-102.5(3), C.R.S., whether a jury damage award for noneconomic loss or injury in excess of \$250,000 (periodically adjusted for inflation) is “justified” or whether any jury damage award for derivative noneconomic loss or injury is “justified.” Under section 13-21-102.5(4), the statutory limitations of subsection (3) are not to be disclosed to the jury, but imposed instead by the court before judgment.

3. For other statutory provisions requiring the use of the standard of “clear and convincing evidence” in a civil action to establish liability or a defense to liability, *see* the Drug Dealer Liability Act, §§ 13-21-801 to -813, C.R.S., which imposes vicarious liability on one who makes illegal drugs available to an illegal user, and the use of such drugs causes damages to others. *See* §§ 13-21-804(3) (proof of liability), -806(2) (proof of comparative negligence as a defense).

#### Source and Authority

This instruction is supported by *Page*, 197 Colo. at 318, 592 P.2d at 800 (“highly probable”); *Whatley v. Wood*, 157 Colo. 552, 404 P.2d 537 (1965) (“clear and convincing” is somewhere between “preponderance” and “beyond a reasonable doubt”); *Jackson Enterprises, Inc. v. Maguire*, 144 Colo. 164, 355 P.2d 540 (1960) (“clear and convincing” greater than a probability or preponderance); and *Huber v. Boyle*, 98 Colo. 360, 363, 56 P.2d 1333, 1335 (1936) (“clear and convincing” means



"clear, precise and indubitable" but does not require direct evidence). See also **People v. Lane**, 196 Colo. 42, 581 P.2d 719 (1978) (citing the former instruction and quoting its operative language with approval); **M.W. v. D.G.**, 710 P.2d 1174 (Colo. App. 1985) (same).

### 3:3 REASONABLE DOUBT—DEFINED

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence, or the lack of evidence, in the case. It is a doubt which is not a vague, speculative, or imaginary doubt, but such a doubt as would cause reasonable people to hesitate to act in matters of importance to themselves.

#### Notes on Use

1. This instruction is to be used in conjunction with instructions such as Instruction 5:4.

2. Typically, courts should not go beyond the bounds of this instruction and attempt to further define reasonable doubt. **Johnson v. People**, 2019 CO 17, ¶ 19, 436 P.3d 529, 534 (“[A]ttempts to further define reasonable doubt do not provide clarity[, e]ven if well-intentioned . . . .”); *see also* **People v. Knobee**, 2020 COA 7, ¶ 38 (“by telling jurors that their decision is no more consequential than choosing a doctor ‘or whatever,’ the court improperly trivialized the prosecution’s burden of proof”) (*cert. granted* June 29, 2020); **People v. Tibbels**, 2019 COA 175, ¶¶ 23, 40 (trial courts’ use of everyday illustrations to explain reasonable doubt are strongly discouraged) (*cert. granted* June 29, 2020).

#### Source and Authority

1. This instruction is supported by **Clark v. People**, 232 P.3d 1287 (Colo. 2010).

2. This instruction is modeled after the third paragraph of COLORADO JURY INSTRUCTIONS—CRIMINAL E:03 (2018).

### 3:4 NO SPECULATION

**Any finding of fact you make must be based on probabilities, not possibilities. You should not guess or speculate about a fact.**

#### Notes on Use

Although the prohibition against surmise, speculation or conjecture is applicable to all issues on which a party may have the burden of proof, it is frequently referred to on issues of damages. The prohibition does not mean, however, that damages must be established with absolute certainty. *See* Instruction 5:6; **Palmer v. Diaz**, 214 P.3d 546 (Colo. App 2009) (difficulty in assessing damages does not preclude damages award).

#### Source and Authority

This instruction is supported by **Letts v. Iwig**, 153 Colo. 20, 384 P.2d 726 (1963) (negligence); **Safeway Stores, Inc. v. Rees**, 152 Colo. 318, 381 P.2d 999 (1963) (proximate cause); **Mosko v. Walton**, 144 Colo. 602, 358 P.2d 49 (1960) (proximate cause); **Alley v. Troutdale Hotel & Realty Co.**, 131 Colo. 124, 279 P.2d 1060 (1955) (proximate cause); **Johns v. Tesley**, 126 Colo. 331, 250 P.2d 194 (1952) (negligence); **Coakley v. Hayes**, 121 Colo. 303, 215 P.2d 901 (1950) (negligence); **Polz v. Donnelly**, 121 Colo. 95, 213 P.2d 385 (1949) (breach of contract); and **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934) (negligence).

## B. PRESUMPTIONS AND PARTICULAR INFERENCES

### 3:5 PERMISSIBLE INFERENCE ARISING FROM REBUTTABLE PRESUMPTION

*The trial court has discretion whether to give either version of this instruction, but the supreme court has stated that “we disfavor instructions emphasizing specific evidence.” See Notes on Use before giving this instruction.*

*Version 1 (to be used when any portion of the factual premise for applying a rebuttable presumption is disputed):*

**You may, but are not required to, draw an inference that** *(insert description of fact or conclusion that may be inferred)* **if you find that** *(insert description of the factual premise for applying a rebuttable presumption).*

**If you draw this inference, you may consider it along with all the other evidence in the case in deciding whether or not** *(state the issue to which the inference is relevant; e.g., the defendant was negligent).*

*Version 2 (to be used when the factual premise for applying a rebuttable presumption is undisputed).*

**In this case it is established that** *(state the factual premise for applying a rebuttable presumption, if the premise is undisputed).* **From** *(this fact) (these facts)* **you may, but are not required to, draw an inference that** *(insert description of fact or conclusion that may be inferred).*

**If you draw this inference, you may consider it along with all the other evidence in the case in deciding whether or not** *(insert description of fact or conclusion that may be inferred).*

#### Notes on Use

1. This instruction applies only to rebuttable presumptions governed by CRE 301. That Rule provides:

In all civil actions and proceedings not otherwise provided for



by statute or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

See **Chapman v. Harner**, 2014 CO 78, ¶ 25, 339 P.3d 519 (holding that CRE 301 applies to the *res ipsa loquitur* doctrine in Colorado; overruling **Weiss v. Axler**, 137 Colo. 544, 328 P.3d 88 (1958) (decided before the adoption of CRE 301)). For statutory presumptions that shift the burden of proof as well as the burden of going forward, which are not governed by Rule 301, see Instruction 3:6.

2. The effect of rebuttable presumptions and the procedure for applying them were substantially altered by **Chapman**, 2014 CO 78, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). Those decisions concern: (a) the presumption of negligence arising when *res ipsa loquitur* applies (**Chapman**) and (b) the presumption of undue influence when a will beneficiary is in a fiduciary or confidential relationship with the testator (**Krueger**). The supreme court has not yet considered whether to apply the holdings of these cases beyond the specific presumptions at issue in those two cases. However, (i) **Chapman** states that “**Krueger** supplies a description of the general effect of rebuttable presumptions,” 2014 CO 78, ¶ 15; (ii) the supreme court adopted the identical procedure in both cases; (iii) the language of the opinions is broad; and (iv) the holdings are consistent with CRE 301. On the face of these decisions, and in the absence of decisions addressing other presumptions, it appears that substantial changes are required in instructions that formerly dealt with rebuttable presumptions.

3. Based on **Krueger** and **Chapman**, the jury is not to be instructed about rebuttable presumptions. Instead, such a presumption “shifts the burden of going forward to the party against whom it is raised.” **Krueger**, 205 P.3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, 2014 CO 78, ¶ 25; **Krueger**, 205 P.3d at 1154, 1156.

4. When the permissible inference arises, the trial court has discretion whether to instruct on that inference. However, the supreme court “disfavor[s] instructions emphasizing specific evidence.” **Krueger**, 205 P.3d at 1157. “A trial court does not abuse its discretion in failing to instruct the jury on a permissible inference unless the omission caused substantial prejudice to the requesting party.” *Id.* When the permissible inference arises, an instruction should be given if “justified by strong underlying policy considerations.” *Id.*

5. As an example of policy considerations that would support giving

a permissible inference instruction, the supreme court cited the presumption that evidence destroyed by a civil litigant would have been unfavorable to the destroying party. *Id.* “A trial court may give this permissible inference instruction as long as it furthers two underlying rationales. The instruction should be both punitive and remedial; it should deter the parties from destroying evidence, and restore the prejudiced party to the position she would have been in had the evidence not been destroyed.” *Id.*

6. Formerly, the jury was instructed that a presumption arose and that the jury should consider the presumption along with all the other evidence in the case. The plaintiff in **Krueger** requested such an instruction. The supreme court held, however, that “a jury instruction on inoperative presumptions is inappropriate,” and would “confuse[ ] the jury as to the role of the rebutted presumption.” *Id.* at 1157.

7. The trial court is to decide whether a party has presented sufficient evidence to invoke the presumption and whether the opposing party has presented sufficient evidence to rebut it. *See id.* at 1153, 1154.

8. This instruction is presented in two alternate versions, depending on whether the factual premise for applying the presumption is disputed. In **Krueger**, for example, the factual premise was that the defendant was (a) a beneficiary of the will, (b) in a confidential or fiduciary relationship with the testator, and (c) actively involved in the preparation or signing of the will. If any portion of the factual premise is in dispute, use version 1. If all of the factual premise is undisputed, use version 2.

9. This instruction should not be given unless there is sufficient evidence from which a reasonable jury could find by a preponderance of the evidence that the basic facts giving rise to the presumption are true. **Devenyns v. Hartig**, 983 P.2d 63 (Colo. App. 1998). Also, this instruction should be used only if supported by an applicable statute or common-law rule. *See, e.g., Yampa Valley Elec. Ass’n v. Telecky*, 862 P.2d 252 (Colo. 1993) (reversible error to instruct on rebuttable presumption in absence of statutory or common-law justification).

10. Instruction 3:8 defines “inference” and should be given if either version of this instruction is given.

### Source and Authority

This instruction is supported by CRE 301; **Chapman**, 2014 CO 78, ¶ 25; and **Krueger**, 205 P.3d at 1157.



### 3:5A INFERENCE ARISING FROM INVOCATION OF FIFTH AMENDMENT PRIVILEGE

You may, but are not required to, draw an inference that the answer to any question that (*name of party*) refused to answer by asserting (his) (her) Constitutional privilege against self-incrimination would have been unfavorable to (him) (her). You should not decide (*name of party's*) (claim) (damages) (liability or non-liability) based solely on (his) (her) assertion of (his) (her) privilege against self-incrimination.

#### Notes on Use

1. Before deciding what adverse consequences, if any, will flow from a party's invocation of the Fifth Amendment privilege against self-incrimination, the trial court must preliminarily determine whether the privilege has been properly invoked. **Steiner v. Minn. Life Ins. Co.**, 85 P.3d 135, 141 & n.5 (Colo. 2004) ("As a threshold matter, a trial court must necessarily determine if the privilege is properly invoked. In other words, the information withheld must be of the sort which could, directly or indirectly, subject the [party] to the possibility of prosecution."). Further, before determining what consequence will flow from a party invoking his or her Fifth Amendment privilege, the trial court must consider the other party's need for the information withheld, whether that party has any alternative means of obtaining that information, and whether any effective remedy, short of dismissal, is available to safeguard both parties' interests. *Id.* at 141. Allowing a negative inference to be drawn from the party's refusal to answer questions is but one potential remedy. *Id.* at 143 (court should consider various possibilities, including negative inference or issuing a stay of discovery until the applicable statute of limitations has run on the party's potential criminal activity).

2. This instruction may be used, in modified form, if a nonparty witness invokes his or her Fifth Amendment privilege. See **McGillis Inv. Co. v. First Interstate Fin. Utah LLC**, 2015 COA 116, ¶ 35, 370 P.3d 295 (admissibility of nonparty's invocation of Fifth Amendment privilege and concomitant drawing of adverse inferences should be considered on a case-by-case basis to assure that any inference is reliable, relevant, and fairly advanced). In deciding whether the suggested inference is reliable, relevant, and fairly advanced, four non-exclusive factors should be considered: (a) the nature of the relevant relationships between the parties and the witness, focusing on the perspective of the nonparty witness's loyalty to the plaintiff or the defendant; (b) "[t]he degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation," and

whether any such control suggests that the testimony might serve as a vicarious admission; (c) “whether the non-party witness is pragmatically a noncaptioned party in interest, and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation”; and (d) whether the nonparty witness is a key figure in the litigation and played a controlling role in any of the underlying aspects of the litigation. *Id.* at ¶¶ 29-35. If the instruction is modified for use with a nonparty witness, the following language may be appropriately added: “You should not draw such an inference if you find that (*name of witness*) asserted the privilege for reasons unrelated to this case.” *Id.* at ¶ 36. It is unclear whether this additional language is appropriate when a party asserts the privilege.

### Source and Authority

This instruction is supported by **Steiner**, 85 P.3d at 141 (where party refused to answer questions based on Fifth Amendment privilege, trial court should have considered remedies short of dismissal, such as allowing a negative inference to be drawn from); **McGillis Inv. Co.**, 2015 COA 116, ¶ 27 (negative inference instruction may be proper when nonparty witness invokes Fifth Amendment privilege); **Chaffin, Inc. v. Wallain**, 689 P.2d 684 (Colo. App. 1984) (factfinder in civil case should be permitted to draw an adverse inference against party who claims the Fifth Amendment privilege in response to discovery requests and to properly posed questions); and **Asplin v. Mueller**, 687 P.2d 1329 (Colo. App. 1984) (not error to require party who declines to answer certain questions on Fifth Amendment grounds to invoke the privilege in jury’s presence, and such failure raises a strong inference that the answers would have been unfavorable).



### 3:6 STATUTORY PRESUMPTIONS THAT SHIFT THE BURDEN OF PROOF

If you find by a preponderance of the evidence **that** (*insert the basic facts of the applicable presumption, describing them in terms appropriate to the specific evidence in the case*), **then you must find that** (*insert the presumed facts, describing them in terms appropriate to the specific evidence in the case*) (**unless you find** [*insert appropriate description of burden of proof, e.g., “by a preponderance of the evidence,” “by clear and convincing evidence,” “beyond a reasonable doubt”*]) **that** [*insert appropriate negative description of presumed fact, e.g., “(name) was not in fact negligent,” “(name) is not in fact the father of (name)”*]).

#### Notes on Use

1. This instruction should be used only for rebuttable statutory presumptions that not only shift the burden of going forward with the evidence, but also shift the burden of proof, and consequently are not governed by CRE 301. See **City of Littleton v. Indus. Claim Appeals Office**, 2016 CO 25, ¶ 37, 370 P.3d 157 (distinguishing between a “Thayer–Wigmore” presumption that shifts only the burden of production and a “Morgan-type” presumption that shifts the burden of persuasion); see also § 33-44-109(2), C.R.S. (presumption of sole responsibility of skier and not ski area operator for certain collisions, discussed in **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985), and **Scott v. Silver Creek Ski Corp.**, 767 P.2d 806 (Colo. App. 1988)).

2. This instruction should not be given unless there is sufficient evidence from which a reasonable jury could find by a preponderance of the evidence that the basic facts giving rise to the presumption are true.

3. When this instruction is given, the parenthetical last clause of the instruction should be omitted unless the party opposing the presumption has established a prima facie case of the nonexistence of the presumed fact. If the party has done that, then that party is entitled to have the jury determine whether the burden of disproving the presumed fact has also been met.

4. Normally the burden of proof to be met as described in the parenthetical last clause will be a preponderance of the evidence. § 13-25-127(1), C.R.S. A specific statute, however, may require a higher standard. See, e.g., § 19-4-105(2), C.R.S. (statutory presumptions of paternity may be rebutted only by clear and convincing evidence).

#### Source and Authority

This instruction is supported by **Pizza**, 711 P.2d at 680, and **Scott**,

767 P.2d at 807.

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### 3:7 CONSTRUCTIVE KNOWLEDGE BASED ON DUTY TO INQUIRE

**You must find that a person knew a fact, if (he) (she) had information that would have led a reasonable person to inquire further and that inquiry would have revealed that fact.**

#### Notes on Use

1. This instruction is applicable to those situations where the law imposes a duty to inquire. Such situations may include negligence cases where a reasonable person would have made further inquiry before proceeding in his or her conduct, e.g., investigating the meaning of a warning signal such as a flashing red light on a road indicating a major road hazard. See **Sheffield Servs. Co. v. Trowbridge**, 211 P.3d 714 (Colo. App. 2009) (inquiry notice in negligent misrepresentation case), *overruled on other grounds by* **Weinstein v. Colborne Foodbotics, LLC**, 2013 CO 33, 302 P.3d 263.

2. This instruction does not apply in deceit cases. See Instruction 19:10.

3. This instruction need not be given in negligence cases if other instructions given in the case adequately advise the jury as to the applicable law. **Allen v. Ramada Inn, Inc.**, 778 P.2d 291 (Colo. App. 1989).

#### Source and Authority

This instruction is supported by **Martinez v. Affordable Housing Network, Inc.**, 123 P.3d 1201 (Colo. 2005).

## C. WEIGHING OF EVIDENCE

### 3:8 EVIDENCE IN THE CASE—STIPULATIONS— JUDICIAL NOTICE—INFERENCES PERMITTED AND DEFINED

The evidence in the case consists of the sworn testimony of all the witnesses (all exhibits which have been received in evidence), (all facts which have been admitted or agreed to), (all facts and events which have been judicially noticed), (and all presumptions stated in these instructions).

In deciding the facts, you must consider only the evidence received at trial. Evidence offered at the trial and rejected or stricken by the Court must not be considered by you. Statements, remarks, arguments, and objections by counsel and remarks of the Court not directed to you are not evidence.

You are to consider only the evidence in the case and the reasonable inferences from that evidence. An inference is a conclusion that follows, as a matter of reason and common sense, from the evidence.

*(If there are any stipulations or admissions of fact or stipulations regarding the testimony of any witnesses, instruct the jury in accordance with Instructions 1:12 and 1:13 unless the jury has already been so instructed.)*

**(When the Court declares it has taken judicial notice of some fact or event, the jury must accept that fact or event as proved.)**

#### Notes on Use

1. If no exhibits have been admitted, or if no facts have been admitted or stipulated or judicially noticed or the jury will not be instructed on any presumptions, references to any of these matters should be deleted from the first paragraph. If the parties have agreed or stipulated to any facts or if the court has judicially noticed any facts, the court should enumerate such facts at the appropriate time, preferably during the trial. Omit the fourth paragraph (or portions thereof) and the fifth paragraph if not applicable.



2. Instruction 3:9 should be given with this instruction whenever the third paragraph of this instruction is given.

3. Though instructions emphasizing specific evidence are disfavored, policy considerations in some circumstances may permit the trial court to instruct the jury on inferences it may draw from particular facts. **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009) (though presumptions of undue influence and unfairness were sufficiently rebutted such that a presumption instruction was inappropriate, trial court had discretion to inform jury of permissible inferences to be drawn from the evidence giving rise to the presumptions); *see, e.g.*, Instructions 3:5 and 34:17.

4. Courts may take judicial notice of the contents of a county attorney's website where (1) the contents of the website on a specific date and time are not subject to reasonable dispute; (2) the party making the request complies with the requirements of CRE 201(d); (3) the website is self-authenticating as an official publication; and (4) the contents fall within an exception to the hearsay rule (such as that for public records and reports). **Shook v. Pitkin Cty. Bd. of Cty. Comm'rs**, 2015 COA 84, ¶ 12 n.4, 411 P.3d 158.

### Source and Authority

1. As to the definition and use of inferences, this instruction is supported by **Venetucci v. City of Colorado Springs**, 99 Colo. 389, 63 P.2d 462 (1936); and **Independence Coffee & Spice Co. v. Kalkman**, 61 Colo. 98, 156 P. 135 (1916). *See also Black's Law Dictionary* 897 (10th ed. 2014).

2. Under CRE 201(g), a judicially noticed fact must be taken by the jury as conclusive. *See also* C. McCORMICK, EVIDENCE § 332, at 931 n.9 (E. Cleary 3d ed. 1984).

### **3:9 DIRECT AND INDIRECT (CIRCUMSTANTIAL) EVIDENCE—DEFINED**

Evidence may be either direct or circumstantial. Circumstantial evidence is the proof of facts or circumstances from which the existence or nonexistence of other facts may reasonably be inferred. All other evidence is direct evidence. The law makes no distinction between the effect of direct evidence and circumstantial evidence.

#### **Notes on Use**

This instruction should be given whenever the third paragraph of Instruction 3:8 is given.

#### **Source and Authority**

This instruction is supported by **Quintana v. Kudrna**, 157 Colo. 421, 402 P.2d 927 (1965); **Miller v. Boma Inv. Co.**, 112 Colo. 7, 144 P.2d 988 (1944); and **In re Estate of Ramstetter**, 2016 COA 81, ¶¶ 53-54, 411 P.3d 1043 (Because circumstantial evidence enjoys the same status as direct evidence, it may be sufficient to support a finding of mutual mistake in a contract dispute.).

### 3:10 DEPOSITIONS AS EVIDENCE

**Certain testimony (will be) (has been) (summarized and read) (video recorded and introduced) (audio recorded and introduced) into evidence from a deposition. A deposition is testimony taken under oath before the trial. You are to consider that (testimony) (summary of testimony) as if it had been given by the witness from the witness stand.**

#### Notes on Use

1. Use whichever parenthesized words are most appropriate.
2. This instruction should be given immediately before or after the deposition is admitted into evidence.
3. This instruction should be given only if a deposition has been admitted as substantive evidence. It should not be given if a deposition has only been used for impeachment, for example, by showing a prior inconsistent statement. If one or more depositions have been used for impeachment purposes in a case in which one or more other depositions have been admitted as substantive evidence, the court should add to this instruction an identification of those depositions which have been admitted as substantive evidence and those which have been used only for impeachment purposes. As to the latter, the court should also caution the jury that they are not to be considered as substantive evidence on the merits of the case, but should be considered by them only insofar as such depositions may relate to the credibility of a witness.
4. The "Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries," adopted in principle by the Colorado Supreme Court in February 1997, recommends:

The court should adopt procedures that would encourage parties to use concise written summaries of deposition testimony instead of reading depositions to the jury and to present such testimony in a logical order.

*Id.* at p. 49, ¶ 21.

#### Source and Authority

This instruction is supported by C.R.C.P. 32(a).

**3:11 TESTIMONY READ FROM TRANSCRIPT**

**Certain testimony (will be) (has been) read into evidence from a transcript of an earlier proceeding. The transcript is testimony taken under oath at the earlier proceeding and preserved in writing. You are to consider that testimony as if it had been given before you from the witness stand.**

**Notes on Use**

This instruction should be given immediately before or after the prior testimony has been properly admitted. As to when such prior testimony is admissible under the hearsay rule, see CRE 804(b)(1).

**Source and Authority**

This instruction is supported by C.R.C.P. 80(c) and 380(b).



### **3:12 PREPONDERANCE NOT DETERMINED BY NUMBER OF WITNESSES**

**The weight of evidence is not necessarily determined by the number of witnesses testifying to a particular fact.**

#### **Notes on Use**

This instruction may be given by the trial court in its discretion when more witnesses have testified to a particular fact for one side than for the other.

#### **Source and Authority**

This instruction is supported by **Swaim v. Swanson**, 118 Colo. 509, 197 P.2d 624 (1948); **Green v. Taney**, 7 Colo. 278, 3 P. 423 (1884); and **Gonzalez v. Windlan**, 2014 COA 176, ¶ 34, 411 P.3d 878.

### 3:13 ADVERSE INFERENCE FROM THE LOSS OR DESTRUCTION OF EVIDENCE

#### Note

1. Due to the range of circumstances surrounding the loss, destruction, or alteration of evidence and a trial court's broad discretion in addressing those circumstances, the Committee has decided to withdraw the instruction that previously appeared here because it did not apply in all circumstances.

2. Trial courts have broad discretion to determine an appropriate sanction for spoliation. The sanction, and any attendant instruction to the jury, depends on the nature of the spoliating party's conduct, including whether the spoliating party acted willfully or in bad faith, recklessly, or in a less egregious manner. See **Aloi v. Union Pac. R.R.**, 129 P.3d 999 (Colo. 2006); **Warembourg v. Excel Elec., Inc.**, 2020 COA 103, ¶¶ 53–57, 471 P.3d 1213.

3. Before any spoliation instruction is given, the court must determine that the lost or destroyed evidence is relevant to the action and otherwise naturally would have been introduced into evidence. **Aloi**, 129 P.3d at 1004.

4. If an instruction uses the term “inference,” also use Instruction 3:8 defining inference.

**3:14 SYMPATHY—PREJUDICE**

**You must not be influenced by sympathy, bias, or prejudice for or against any party in this case.**

**Notes on Use**

This instruction should not be given in a juvenile delinquency case because the point is covered by the fourth paragraph of Instruction 40:3, which is applicable to such proceedings.

### 3:15 EXPERT WITNESSES

A witness qualified as an expert by education, training, or experience may state opinions. You should judge expert testimony just as you would judge any other testimony. You may accept it or reject it, in whole or in part. You should give the testimony the importance you think it deserves, considering the witness's qualifications, the reasons for the opinions, and all of the other evidence in the case.

#### Notes on Use

1. This instruction should be given only if one or more expert witnesses have testified in the case. The court should not point out to the jury which witnesses testified as experts, since this might put undue emphasis on their testimony.

2. This instruction applies to a "professional person" appointed by the court under section 27-65-111(2), C.R.S., to testify in a mental health proceeding for short-term or long-term care and treatment.

#### Source and Authority

1. This instruction is supported by CRE 702; **Young v. Burke**, 139 Colo. 305, 338 P.2d 284 (1959); and **Ryan Gulch Reservoir Co. v. Swartz**, 83 Colo. 225, 263 P. 728 (1928).

2. The testimony of an expert witness is to be treated the same as that of any other witness. **Burnham v. Grant**, 24 Colo. App. 131, 134 P. 254 (1913).

3. For a discussion regarding the propriety of admitting expert testimony under CRE 702, see **Huntoon v. TCI Cablevision of Colorado, Inc.**, 969 P.2d 681 (Colo. 1998).

4. The jury is not bound by the expert's testimony even when there is no contradictory evidence. **McWilliams v. Garstin**, 70 Colo. 59, 197 P. 246 (1921).



### 3:16 DETERMINING CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of the witnesses and the weight to be given their testimony. You should take into consideration their means of knowledge, strength of memory and opportunities for observation; the reasonableness or unreasonableness of their testimony; the consistency or lack of consistency in their testimony; their motives; whether their testimony has been contradicted or supported by other evidence; their bias, prejudice or interest, if any; their manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the credibility of the witnesses.

Based on these considerations, you may believe all, part or none of the testimony of a witness.

#### Notes on Use

A separate instruction on impeaching a witness by contradictory evidence, bad reputation for truth and veracity, convictions of a felony, etc., should not be given since these matters are adequately covered by this instruction.

#### Source and Authority

1. This instruction is supported by **Prudential Insurance Co. of America v. Cline**, 98 Colo. 275, 57 P.2d 1205 (1936), *overruled on other grounds by* **Lockwood v. Travelers Insurance Co.**, 179 Colo. 103, 498 P.2d 947 (1972).

2. In **Murray v. Just in Case Business Lighthouse, LLC**, 2016 CO 47M, ¶ 21, 374 P.3d 443, 451, the Colorado Supreme Court held that, subject to the trial court's discretion to determine whether to allow a witness to testify, "a witness's credibility is for the fact-finder to decide."

3. The jury is entitled to disregard all or any portion of the testimony of any witness who it finds has willfully testified falsely to any material fact. **Denver & Rio Grande R.R. v. Warring**, 37 Colo. 122, 86 P. 305 (1906); **Ward v. Ward**, 25 Colo. 33, 52 P. 1105 (1898); *see also* **Gordon v. Benson**, 925 P.2d 775 (Colo. 1996) (jury may believe all or just part of the testimony of a witness); **Huntoon v. TCI Cablevision of Colo., Inc.**, 948 P.2d 33 (Colo. App. 1997) (same), *rev'd on other*



### 3:17 HIGHLIGHTED EXHIBITS

**The lawyers have highlighted certain parts of some exhibits. However, it is for you to determine the significance of the highlighted parts.**

#### Notes on Use

The “Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries,” adopted in principle by the Colorado Supreme Court in February 1997, recommends:

The court should adopt procedures that would allow important exhibits to be highlighted or otherwise marked to direct jurors’ attention to significant parts of an exhibit.

*Id.* at p. 50, ¶ 22.

#### Source and Authority

This instruction is supported by C.R.C.P. 16(f)(3)(VI)(B).

## **CHAPTER 4. JURY DELIBERATIONS; VERDICT FORMS**

### **A. DELIBERATIONS**

- 4:1 Summary Closing Instruction
- 4:1A Applying Law to The Evidence
- 4:2 Duties Upon Retiring—Selection of Foreperson
- 4:2A Questions During Deliberations
- 4:3 Instruction When Jury Appears Deadlocked or  
Deliberations are Unusually Prolonged

### **B. VERDICTS**

- 4:4 Verdict Form for Plaintiff—Single Plaintiff and Single  
Defendant—Actual or Nominal Damages Only
- 4:5 Verdict Form for Plaintiff—Single Plaintiff and Single  
Defendant—Actual and Punitive Damages
- 4:6 Verdict Form for Defendant—Single Plaintiff and Single  
Defendant
- 4:7 Verdict Forms for Single Plaintiff and Multiple Defendants,  
Multiple Plaintiffs and Single Defendant, and Multiple  
Plaintiffs and Multiple Defendants
- 4:8 Verdict Form for Plaintiff on Counterclaim
- 4:9 Verdict Form for Defendant on Counterclaim
- 4:10 Verdict Form for Third-Party Plaintiff
- 4:11 Verdict Form for Third-Party Defendant
- 4:12 Verdict Form for Cross-Claimant
- 4:13 Verdict Form Against Cross-Claimant
- 4:14 Rendering a Sealed Verdict
- 4:15 Special Verdict (or Special Interrogatories)—Sample of  
Mechanics for Submitting
- 4:16 Special Verdict (or Special Interrogatories) Form—Sample
- 4:17 Reserved for Future Use
- 4:18 Reserved for Future Use
- 4:19 Reserved for Future Use
- 4:20 Model Unified Verdict Form



## A. DELIBERATIONS

### 4:1 SUMMARY CLOSING INSTRUCTION

These instructions contain the law that you must use in deciding this case. No single instruction states all the applicable law. All the instructions must be read and considered together.

You must not be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law should be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

(The Court) (I) (does) (do) not, by these instructions, express any opinions as to what has or has not been proved in the case, or to what are or are not the facts of the case.

#### Notes on Use

1. This instruction should be given after the court has completed giving the jury all the instructions relating to the merits of the case.
2. If the court has taken judicial notice of any facts or the parties have stipulated to any facts, the last paragraph of this instruction should be modified accordingly.

#### Source and Authority

This instruction is supported by **Day v. Johnson**, 255 P.3d 1064 (Colo. 2011); **Niemand v. Dist. Court**, 684 P.2d 931 (Colo. 1984); and **Alvarez v. People**, 653 P.2d 1127 (Colo. 1982). *See also* COLORADO JURY INSTRUCTIONS—CRIMINAL E:01 (2018).

## 4:1A APPLYING LAW TO THE EVIDENCE

In your deliberations, your duty is to apply (the Court's) (my) instructions of law to the evidence that you have seen and heard in the courtroom. You are not allowed to look at, read, consult, or use any material of any kind, including any newspapers, magazines, television and radio broadcasts, dictionaries, medical, scientific, technical, religious, or law books or materials, or the Internet in connection with your jury service. I want to emphasize that you must not seek or receive any information about this case from the Internet, which includes all social networking, Google, Wikipedia, blogs, and any other website. You are not allowed to do any research of any kind about this case.

Do not use any information from any other source concerning the facts or the law applicable to this case other than the evidence presented and the instructions that I give you. Do not do your own investigation about this case. (You are not allowed to visit any place[s] mentioned in the evidence. If this is an area that you normally go through, you should try to take an alternate route. If you are not able to take an alternate route, you should not gather any information from that location.)

### Notes on Use

1. This instruction, for use before the jury begins deliberations, parallels the admonitions in Instructions 1:1, 1:4, and 1:5, which are given at the beginning of the trial, and Instruction 1:10, which is given at recess.

2. In some circumstances, the trial court may choose to give Instruction 1:5 with this instruction.

### Source and Authority

This instruction is supported by **People v. Harlan**, 109 P.3d 616 (Colo. 2005); **People v. Wadle**, 97 P.3d 932 (Colo. 2004); and **People v. Kriho**, 996 P.2d 158 (Colo. App. 1999).

## 4:2 DUTIES UPON RETIRING—SELECTION OF FOREPERSON

The original forms of the written instructions and the exhibits are a part of the court record. Do not place any marks or notes on them. (The instructions labeled “copy” may be marked or used in any way you see fit.)

The Bailiff will now escort you to the jury room. After you get to the jury room you shall select one of your members to be the foreperson of the jury. That person will be in charge of your discussions. You must all agree on your verdict, and you must sign the original form of whatever verdict(s) you reach.

Please notify the Bailiff when you have reached a verdict, but do not tell the Bailiff what your verdict is. You shall keep the verdict forms, these instructions, and the exhibits until (the Court) (I) (gives) (give) you further instructions.

### Notes on Use

1. Omit the parenthesized sentence in the first paragraph of this instruction if copies of the original instructions have not been given to the jury.

2. In a district court case, if the parties have stipulated pursuant to C.R.C.P. 48 that the verdict or finding shall be by some stated majority rather than by unanimous vote, this instruction should be modified accordingly.

3. In county court cases, the jury’s verdict must always be unanimous. C.R.C.P. 347(s).

4. While all members of the jury are directed to sign the verdict, the names of the jurors should still be called, in accord with the requirements of C.R.C.P. 47(q) or 347(q), and the jurors asked, at least collectively, by the court or clerk, if they have agreed upon a verdict, and if the foreperson’s answer is affirmative, the verdict should then be handed to the clerk. **Kading v. Kading**, 683 P.2d 373 (Colo. App. 1984) (failure to call the names of the jurors prior to receiving the verdict held harmless where all jurors had signed the verdict form). “Individual polling of the jurors is required under the rule only when requested by a party.” *Id.* at 376. On its own motion, the court may poll the jury individually

to determine the validity of the verdict and should do so, for example, if one or more members of the jury failed to sign the verdict form returned. See C.R.C.P. 47(r) & (s), 347(r) & (s).

5. The jury may retire for their deliberations or arrive at a verdict in court. C.R.C.P. 47(l), 347(l). These same rules prescribe the responsibilities of the bailiff if the jury does retire for their deliberations.



## 4:2A QUESTIONS DURING DELIBERATIONS

Once you begin your deliberations, if you have a question about the evidence in this case or about the instructions (or) (verdict forms) (special interrogatories) that you have been given, your foreperson should write the question on a piece of paper, sign it and give it to the Bailiff who will bring it to me.

(The Court) (I) will then confer with the attorneys as to the appropriate way to answer your question. However, there may be some questions that, under the law, (the Court is) (I am) not permitted to answer. If it is improper for (the Court) (me) to answer the question, (the Court) (I) will tell you that. Please do not speculate about what the answer to your question might be or why (the Court is) (I am) not able to answer a particular question.

### Notes on Use

The "Report of the Colorado Supreme Court Committee on the Effective and Efficient Use of Juries," which was adopted in principle by the Colorado Supreme Court in February 1997, recommends:

The trial judge should instruct jurors about what they should do if they have a question during deliberations and how the judge will deal with it. Additionally, judges should be directed by the Chief Justice to attempt to answer the jurors' questions. If the question cannot be answered, the judge should explain why that is so in a courteous and complete manner.

*Id.* at p. 52, ¶ 24.

### 4:3 INSTRUCTION WHEN JURY APPEARS DEADLOCKED OR DELIBERATIONS ARE UNUSUALLY PROLONGED

Because it appears that your deliberations are taking awhile, I would like to offer some suggestions to help you come to a decision.

(The Court) (I) wish(es) you to continue your deliberations keeping in mind the following:

1. You have a duty to discuss the evidence with each other. Your goal should be to reach an agreement;
2. You must each decide for yourself, but you should consider the views of the other jurors with an open mind;
3. You should not hesitate to re-examine your own views and change your opinion if you become convinced that you were wrong; and
4. You should not change your mind just to agree with the other jurors or just to return a verdict.

#### Notes on Use

1. For guidance as to the appropriate time and circumstances when this instruction may be given, see **Luster v. Brinkman**, 205 P.3d 410 (Colo. App. 2008) (no coercive effect in giving this instruction and suggesting that the jury call it “quits” for the day and resume deliberations next morning). See also **Ford v. Bd. of Cty. Comm’rs**, 677 P.2d 358 (Colo. App. 1983) (not an abuse of discretion to give this instruction when jury was unable to agree on total amount of damages but the trial court, after appropriate inquiries, concluded there was a reasonable probability of agreement). However, the court should not give this instruction without first ascertaining the likelihood of progress towards a unanimous verdict if deliberations continue. See **People v. Black**, 2020 COA 136, ¶ 29, 490 P.3d 891.

2. Having determined the jury is not unanimous, the court may either discharge it or direct it to deliberate further. C.R.C.P. 47(s); **Neil v. Espinoza**, 747 P.2d 1257 (Colo. 1987).

3. In rare circumstances, the court should consider exercising its

discretion to instruct a deadlocked jury about the possibility of a mistrial when the instruction will not have a coercive effect on the jury. **Fain v. People**, 2014 CO 69, ¶ 16, 329 P.3d 270; **Martin v. People**, 2014 CO 68, ¶ 17, 329 P.3d 247; **Gibbons v. People**, 2014 CO 67, ¶ 14, 328 P.3d 95. Likewise, while a time-fuse instruction is discouraged, its use should be evaluated on a case-by-case basis depending on its coercive effect. **Gibbons**, ¶¶ 19-20; **Allen v. People**, 660 P.2d 896 (Colo. 1983).

Source and Authority

This instruction is supported by **Allen**, 660 P.2d at 898 (Colo.1983); and **Luster**, 205 P.3d at 415-16.

**B. VERDICTS****4:4 VERDICT FORM FOR PLAINTIFF—SINGLE  
PLAINTIFF AND SINGLE DEFENDANT—  
ACTUAL OR NOMINAL DAMAGES ONLY**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
v.	)	VERDICT
_____	)	
Defendant.	)	

We, the jury, find for the plaintiff, *(name)*, and  
award damages of \$\_\_\_\_\_ against the defendant,  
*(name)*.

_____	_____
	Foreperson
_____	_____
_____	_____

**Notes on Use**

1. See the Notes on Use to Instruction 4:2.
2. For special interrogatories or verdict forms that may be necessary to determine the amount of recoverable damages in civil actions involving noneconomic losses, see the Notes on Use to Instructions 6:1, 6:1A, and 6:1B.
3. For other special verdict instructions and forms, see the Notes on Use to Instruction 4:15.
4. While all members of the jury are directed to sign the verdict, *see* Instruction 4:2, polling the jury is nonetheless proper, and should be done by the court in order to determine the validity of the verdict if one or more members of the jury failed to sign the verdict form returned. *See* C.R.C.P. 47(q)-(s), 347(q)-(s). Though all members of the jury may have signed the verdict form, the names of the jurors should still be called, in accord with the requirements of C.R.C.P. 47(q) or 347(q), and



the jurors asked, at least collectively, by the court or clerk if they have agreed upon a verdict, and if the foreperson's answer is affirmative, the verdict should then be handed to the clerk. **Kading v. Kading**, 683 P.2d 373 (Colo. App. 1984) (failure to call the names of the jurors prior to receiving the verdict held harmless where all the jurors had signed the verdict form; individual polling required under the rule only when requested by the party).

5. Pursuant to C.R.C.P. 47(s), if the verdict is not unanimous, the trial court can either send the jury out for further deliberations or discharge it. **Neil v. Espinoza**, 747 P.2d 1257 (Colo. 1987). If during the polling of the jury, a juror clearly and unequivocally states that the verdict is not unanimous, it is reversible error for the trial court to delve into the deliberations and mental processes of the jury by engaging in extended questioning of the dissenting juror. **Simpson v. Stjernholm**, 985 P.2d 31 (Colo. App. 1998); *see also* CRE 606(b).

**4:5 VERDICT FORM FOR PLAINTIFF—SINGLE  
PLAINTIFF AND SINGLE DEFENDANT—  
ACTUAL AND PUNITIVE DAMAGES**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>VERDICT</b>
_____	)	
<b>Defendant.</b>	)	

**We, the jury, find for the plaintiff, (*name*), and  
award damages of \$\_\_\_\_\_, and punitive damages of  
\$\_\_\_\_\_, against the defendant, (*name*).**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

1. See the Notes on Use to Instruction 4:4.
2. Instruction 5:4 relating to punitive damages must be given with this instruction.
3. The verdict must state separately the amount of any punitive damages. **Montgomery v. Tufford**, 165 Colo. 18, 437 P.2d 36 (1968).

**4:6 VERDICT FORM FOR DEFENDANT—SINGLE PLAINTIFF AND SINGLE DEFENDANT**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>VERDICT</b>
_____	)	
<b>Defendant.</b>	)	

**We, the jury, find for the defendant, (*name*), and  
against the plaintiff, (*name*).**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

See the Notes on Use to Instruction 4:4.

**4:7 VERDICT FORMS FOR SINGLE PLAINTIFF  
AND MULTIPLE DEFENDANTS,  
MULTIPLE PLAINTIFFS AND SINGLE  
DEFENDANT, AND MULTIPLE  
PLAINTIFFS AND MULTIPLE  
DEFENDANTS**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
v.	)	VERDICT
_____	)	
Defendant.	)	

**YOU ARE TO SIGN EITHER PART A. OR PART B.  
BELOW OF THIS VERDICT, BUT NOT BOTH.**

**Part A.**

We, the jury, find for the plaintiff, *(name)*, and  
award damages of \$\_\_\_\_\_ against the defendant,  
*(name)*.

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Part B.**

We, the jury, find for the defendant, *(name)*, and  
against the plaintiff, *(name)*.

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____



**Notes on Use**

1. See the Notes on Use to Instruction 4:4.

2. A separate verdict form should be submitted for each possible combination of a single plaintiff against a single defendant, with the appropriate names of the individual parties inserted.

3. Where there is sufficient evidence relating to punitive damages, Part A. should be appropriately modified. *See* Instruction 4:5.

4. This instruction may be used in cases where a jury could properly find against two or more defendants, but in differing amounts, for example, where one tortfeasor causes an accident and a second tortfeasor, as a result, is put in a position where he is able and does add to the plaintiff's damages, thus becoming a joint tortfeasor as to those damages.

4:8 VERDICT FORM FOR PLAINTIFF ON  
COUNTERCLAIM

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
v.	)	VERDICT—
	)	COUNTERCLAIM
_____	)	
Defendant.	)	

We, the jury, find for the plaintiff, *(name)*, and  
against the defendant, *(name)*, on the defendant's  
counterclaim.

_____	_____
	Foreperson
_____	_____
_____	_____

Notes on Use

See the Notes on Use to Instruction 4:4.

**4:9 VERDICT FORM FOR DEFENDANT ON  
COUNTERCLAIM**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v. _____</b>	)	<b>VERDICT—</b>
	)	<b>COUNTERCLAIM</b>
_____	)	
<b>Defendant.</b>	)	

**We, the jury, find for the defendant, (name), and  
against the plaintiff, (name), and award damages of  
\$ \_\_\_\_\_ on the defendant's counterclaim.**

_____	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

1. See the Notes on Use to Instructions 4:4 and 4:8.
2. In appropriate cases, this instruction should be modified to include an insertion for punitive damages. See Instruction 4:5.

# **4:10 VERDICT FORM FOR THIRD-PARTY PLAINTIFF**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>VERDICT—THIRD-</b>
	)	<b>PARTY</b>
	)	<b>COMPLAINT</b>
_____	)	
<b>Defendant.</b>	)	

**We, the jury, find for the third-party plaintiff,  
(name), and award damages of \$\_\_\_\_\_ against the  
third-party defendant, (name).**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

## **Notes on Use**

1. See the Notes on Use to Instruction 4:4.
2. In appropriate cases, this instruction should be modified to include an insertion for punitive damages. See Instruction 4:5.



# **4:11 VERDICT FORM FOR THIRD-PARTY DEFENDANT**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>VERDICT—THIRD-</b>
	)	<b>PARTY</b>
	)	<b>COMPLAINT</b>
_____	)	
<b>Defendant.</b>	)	

**We, the jury, find for the third-party defendant,  
(name), and against the third-party plaintiff, (name).**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

## **Notes on Use**

1. See the Notes on Use to Instruction 4:4.
2. In appropriate cases, this instruction should be modified to include an insertion for punitive damages. *See* Instruction 4:5.

**4:12 VERDICT FORM FOR CROSS-CLAIMANT**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
 Civil Action No. \_\_\_\_\_

_____ )	
<b>Plaintiff,</b> )	
<b>v.</b> )	<b>VERDICT—CROSS-</b>
_____ )	<b>CLAIM</b>
<b>Defendant.</b> )	

We, the jury, find for the cross-claimant, *(name)*,  
 and award damages of \$\_\_\_\_\_ against the defen-  
 dant, *(name)*.

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

1. See the Notes on Use to Instruction 4:4.
2. In appropriate cases, this instruction should be modified to include an insertion for punitive damages. See Instruction 4:5.
3. When appropriate, this form together with Instruction 4:13 should be submitted to the jury along with any other forms necessary for the jury to render their decisions on all other issues among the parties.

**4:13 VERDICT FORM AGAINST CROSS-CLAIMANT**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
 Civil Action No. \_\_\_\_\_

_____ )	<b>VERDICT—CROSS-CLAIM</b>
<b>Plaintiff,</b>	
<b>v.</b>	
_____ )	
<b>Defendant.</b>	)

**We, the jury, find for the defendant, (*name*), and against the cross-claimant, (*name*).**

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

**Notes on Use**

See the Notes on Use to Instructions 4:4 and 4:12.

**4:14 RENDERING A SEALED VERDICT**

If you agree upon your verdict after the adjournment of court for the day, your foreperson will complete and sign the verdict and enclose and seal the verdict forms in an envelope. Your foreperson shall deliver the sealed envelope to *(insert description of appropriate court official)*. You may then separate, but you must each return and be present in the jury box *(insert date and time)* when the sealed envelope will be delivered to the Court. You are not to discuss the case or your deliberations, and you are not to reveal the verdict to anyone until after your verdict is read in court.

**Notes on Use**

This instruction should be used when the court, pursuant to C.R.C.P. 47(p) or 347(p), desires to “direct the jury to bring in a sealed verdict at the opening of court, in case of an agreement during a recess or adjournment for the day.”

**Source and Authority**

This instruction is supported by C.R.C.P. 47(p) and 347(p).



#### **4:15 SPECIAL VERDICT (OR SPECIAL INTERROGATORIES)—SAMPLE OF MECHANICS FOR SUBMITTING**

**You are instructed to answer the following questions which will be on a form for Special Verdict:**

- 1. Did the plaintiff, (*name*), own a white horse?**
- 2. Did the defendant, (*name*), ride the white horse without the plaintiff's permission?**
- 3. Was the plaintiff damaged as a result of the defendant's riding of the white horse?**
- 4. State the amount of damages, if any, that the plaintiff had that were caused by the conduct of the defendant.**

**Before you return the Special Verdict answering these questions, you must all agree on the answers to each of the questions. Upon arriving at such agreement, your foreperson will insert each answer in the verdict and then he or she and all other jurors will sign it upon completion of all answers.**

#### **Notes on Use**

1. The questions contained in the above instruction are for the purpose of illustration only.
2. This instruction, appropriately modified, may also be used for submitting special interrogatories to the jury.
3. For the special verdict instructions and forms to be used generally, and for determining the individual and several liability of defendants on a comparative basis among themselves and any nonparties under section 13-21-111.5, C.R.S., see Instructions 9:28 and 9:28A through 9:28D (when there is also a comparative negligence issue) or Instructions 9:29, 9:29A, and 9:29B (when there is no comparative negligence issue). For certain other cases, special verdict forms and instructions for their submission have also been prepared. *See, e.g.*, Instructions 9:26–9:27D (comparative negligence); 14:30–14:33 (product liability comparative fault); 35:1, 35:2, 35:7, 35:8 (mental health); 41:17, 41:18 (dependency and neglect).

4. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, the last paragraph of this instruction should be modified accordingly.

5. If, depending on how certain questions are answered, not all the remaining questions need be answered, this instruction should be appropriately modified.

6. In submitting a case for a special verdict, instructions defining the various legal terms used in the questions must also be given.

7. This form with the first and last paragraphs appropriately modified may be used, under C.R.C.P. 49(b), to submit written interrogatories to the jury to accompany a general verdict. There is no similar provision for use in county court.

8. See also the Notes on Use to Instruction 4:4.

### Source and Authority

This instruction is supported by C.R.C.P. 49.

# **4:16 SPECIAL VERDICT (OR SPECIAL INTERROGATORIES) FORM—SAMPLE**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
v.	)	SPECIAL VERDICT
_____	)	
Defendant.	)	

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

**QUESTION NO. 1:** Did the plaintiff, (*name*), own a white horse? (yes or no)

**ANSWER NO. 1:** \_\_\_\_\_

**QUESTION NO. 2:** Did the defendant, (*name*), ride the white horse without the plaintiff's permission? (yes or no)

**ANSWER NO. 2:** \_\_\_\_\_

**QUESTION NO. 3:** Was the plaintiff damaged as a result of the defendant's riding of the white horse? (yes or no)

**ANSWER NO. 3:** \_\_\_\_\_

**QUESTION NO. 4:** State the amount of damages, if any, which the plaintiff had that were caused by the conduct of the defendant? (insert the amount or "none")

**ANSWER NO. 4:** \$ \_\_\_\_\_.

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**Foreperson**


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**Notes on Use**

1. See the Notes on Use to Instructions 4:4 and 4:15.
2. When this form is used under C.R.C.P. 49(b) to submit written interrogatories to the jury to accompany a general verdict, the caption title "Special Verdict" should be changed to "Answers to Written Interrogatories."

**Source and Authority**

This instruction is supported by C.R.C.P. 49.



4:17 RESERVED FOR FUTURE USE

4:18 **RESERVED FOR FUTURE USE**

**4:19 RESERVED FOR FUTURE USE**

**4:20 MODEL UNIFIED VERDICT FORM**

**You are instructed to answer the following questions. You must apply the law in the instructions that the Court gave you to the facts that were proved by the evidence. You must all agree on your answer to each question and you must all sign the completed form on the signature lines.**

**ANSWERS**

**We, the jury, present our answers to questions submitted by the Court, to which we have all agreed:**

*(INSERT TITLE OF [FIRST] CLAIM AGAINST FIRST DEFENDANT*

**1. Do you find in favor of the plaintiff, (name), and against the defendant, (name of the first defendant), on (his) (her) (its) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . .,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*Insert title[s] of claim[s] and additional separately numbered similar paragraphs with the titles of applicable claims, so as to include all claims being made against the first defendant.)*

*(INSERT TITLE OF [FIRST] CLAIM AGAINST SECOND DEFENDANT*

**2. Do you find in favor of the plaintiff, (name), and against the defendant, (name of second defendant), on (his) (her) (its) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . .,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim)? (Yes or No)**

**ANSWER: \_\_\_\_\_**



*Insert additional separately numbered similar paragraphs with the titles of applicable claims, so as to include all claims being made against the second defendant.)*

**If you answered all of the above questions “No,” then STOP HERE, go to the end of this Verdict Form, and sign as indicated.**

**If, on the other hand, you answered “Yes” to any or all of the above questions, THEN ANSWER THE FOLLOWING QUESTIONS.**

*(Note: examples for cases in which special interrogatories are appropriate instead of these general verdict questions are in the boxes directly below.)*

#### NEGLIGENCE

**Answer each of the questions below concerning the claim of the plaintiff, (name), for negligence under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim):*

**a. Did the plaintiff, (name), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**b. Was the defendant, (name of first defendant), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**c. Was the defendant’s negligence, if any, a cause of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**If you answered any of the above questions “No,” then you must find for the defendant on the plaintiff’s claim for negligence, and you do not need to answer any of the following questions with respect to that claim.**

**If, on the other hand, you answered “Yes” to all of the above questions, THEN ANSWER THE FOLLOWING QUESTIONS.**

#### BREACH OF CONTRACT

**Answer each of the questions below concerning the claim of the plaintiff, (name), for breach of contract under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim):*

**a. Did the defendant, (name), enter into a contract with the plaintiff to (insert the alleged promise on which plaintiff is suing)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**b. Did the defendant fail to (insert the alleged promise on which the plaintiff is suing)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**c. Did the plaintiff, (name), [substantially] perform [his] [her] [its] part of the contract) (or) (Is the plaintiff, (name), excused from performance of [his] [her] [its] part of the contract because [insert facts that, if proven, would as a matter of law justify non-performance])? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**If you answered any of the above questions “No,” then you must find for the defendant on the plaintiff’s claim for breach of contract, and you do not need to answer any of the following questions with respect to that claim.**

**If, on the other hand, you answered “Yes” to all of the above questions, THEN ANSWER THE FOLLOWING QUESTIONS.**

**(3. Was the plaintiff, (name), (negligent) (or) (at fault) in causing (his) (her) (its) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative negligence or fault)? (Yes or No)**

**ANSWER: \_\_\_\_\_)**

*(Insert, as shown above in question 3, additional separately numbered similar paragraphs so as to include other defenses to the plaintiff’s claims.)*

**(4. Was (name or appropriate description of [first] designated nonparty) (negligent) (or) (at fault) in causing the plaintiff’s (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of nonparty negligence or fault)? (Yes or No)?**

**ANSWER: \_\_\_\_\_)**

*(Insert additional separately numbered similar paragraphs for any other designated nonparties.)*

**5. State the total amount of the plaintiff's damages[, without considering the percentages of (negligence) (and) (or) (fault) of any of the parties (or nonparties).] The categories of damages or losses are described in Instruction No. \_\_\_\_.**

**a. What is the total amount of the plaintiff's damages, if any, for non-economic losses or injuries? Non-economic losses or injuries are those losses or injuries described in paragraph 1 of Instruction \_\_\_\_.** You should answer "0" if you determine there were none.

**ANSWER: \$ \_\_\_\_\_**

**b. What is the total amount of the plaintiff's damages, if any, for economic losses? Economic losses are those losses described in numbered paragraph 2 of Instruction No. \_\_\_\_.** You should answer "0" if you determine there were none.

**ANSWER: \$ \_\_\_\_\_**

**c. What is the total amount of the plaintiff's damages, if any, for physical impairment or disfigurement? In computing damages in this category, you shall not include any damages for losses or injuries already determined above. You should answer "0" if you determine there were none.**

**ANSWER: \$ \_\_\_\_\_**

*(Note: an example for damages questions in a property damage case is below.)*

*(Alternative or additional language for claims involving property damage)*

**State below the amount of dollars that will compensate the plaintiff for (his) (her) (its) damages, as set forth in Instruction No. \_\_\_\_.**

**a. Reasonable repair and/or replacement costs, if any:**

**ANSWER: \$ \_\_\_\_\_**

**b. Other reasonable costs or losses, if any:**

**ANSWER: \$ \_\_\_\_\_**

**c. The decrease in market value of the property, if any, as repaired:**

**ANSWER: \$ \_\_\_\_\_**



*(Alternative or additional language for claims involving breach of contract)*

State below the amount of dollars that will compensate the plaintiff for (his) (her) (its) damages that were the natural and probable consequences of the defendant's breach of contract and that the defendant reasonably could have foreseen at the time the parties entered into the contract could probably occur if the defendant breached the contract, as set forth in Instruction No. \_\_\_\_.

a. *(Insert proper measure of general damages that have been proved depending on the kind of contract involved), if any:*

ANSWER: \$ \_\_\_\_\_

b. *(Insert the proper measure of any recoverable special damages that have been proved), if any:*

ANSWER: \$ \_\_\_\_\_

(6. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage of the plaintiff's damages was caused by the (negligence) (or) (fault), if any, of:

a. The plaintiff; (and)

b. Each of the defendants from whom you have found the plaintiff is entitled to recover; (and)

c. (The designated nonparty) (Any one or more of the designated nonparties).

You must enter "0" for any party and designated nonparty you have found was not (negligent) (or) (at fault).

ANSWER:

Percentage, if any, charged to the plaintiff, (name): \_\_\_\_\_%

Percentage, if any, charged to defendant, (name of first defendant): \_\_\_\_\_%

Percentage, if any, charged to defendant, (name of second defendant): \_\_\_\_\_%

Percentage, if any, charged to designated nonparty, (name of first designated nonparty): \_\_\_\_\_%



Percentage charged to designated  
nonparty, (name of second designated  
nonparty):

\_\_\_\_\_ %

MUST TOTAL: 100%)

(7. Do you find that the plaintiff has proved beyond a reasonable doubt (his) (her) (its) claim for punitive damages against the defendant, as set forth in Instruction No. \_\_\_\_? (Yes or No)

ANSWER: \_\_\_\_\_

If you answered this question “No,” then sign the verdict form. If you answered “Yes,” state the amount of punitive damages that you determine the plaintiff should recover.

ANSWER: \$ \_\_\_\_\_

Please sign this form. If any verdict forms for other plaintiffs remain unanswered, complete them.

_____	_____
	<b>Foreperson</b>
_____	_____
_____	_____

### Notes on Use

1. This model unified form has been developed by the Committee for the 2012 edition of this book with the intent that it will eventually be used in all cases, with appropriate modifications. An alternative to the verdict forms used in other Chapters, the model form incorporates questions for a tort case, but also includes substitute or additional language for cases involving other claims, such as contract and property cases. The Committee invites comments from judges and practitioners with respect to the utility and application of this model form. Please forward your comments to [bal@levinsitcoff.com](mailto:bal@levinsitcoff.com).

2. For medical malpractice cases, Special Verdict Forms set forth in Instruction 15:15 should be used to comply with the requirements of the Health Care Availability Act, §§ 13-64-204, 13-64-205(d), C.R.S. **HealthONE v. Rodriguez**, 50 P.3d 879 (Colo. 2002); **Preston v. Dupont**, 35 P.3d 433 (Colo. 2001); **Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.**, 168 P.3d 512 (Colo. App. 2007).

3. In tort cases where the jury is asked to make findings regarding

the comparative negligence or fault of the parties and any designated nonparties on the amount of damages recoverable by the plaintiff, it must be instructed regarding the effects of its findings. *See* § 13-21-111.5(5), C.R.S. *See also* Instructions 9:26, 9:27, 9:28, 14:30, 14:31, 14:32, 14:33.

### Source and Authority

1. This instruction is supported by C.R.C.P. 49. *See also* §§ 13-21-111, -111.5, C.R.S.

2. In **Slack v. Farmers Insurance Exchange**, 5 P.3d 280, 282 (Colo. 2000), the Colorado Supreme Court addressed the issue of whether section 13-21-111.5, C.R.S., “requires the pro rata distribution of civil liability among intentional and negligent tortfeasors who jointly cause indivisible injuries.” The court concluded that the statute required such a distribution and explained that the statutory term “fault” means “more than mere negligence, and includes intentional acts.” *Id.* at 285; *accord* **Pedge v. R.M. Holdings, Inc.**, 75 P.3d 1126 (Colo. App. 2002) (tortfeasors who commit intentional torts can be designated as nonparties). *But see* **Toothman v. Freeborn & Peters**, 80 P.3d 804 (Colo. App. 2002) (nothing in the pro rata statute suggests that plaintiff’s fault should reduce a defendant’s liability for his intentional torts). In cases where the pro rata liability statute is applicable, this instruction may be used.

3. The provisions of section 13-21-111.5 are not limited to negligence actions, but may be applicable to, for example, a strict products liability action. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995). However, section 13-21-111.5(1) limits the scope of the pro rata liability statute to only those actions “brought as a result of a death or an injury to person or property.” **Broderick v. McElroy & McCoy, Inc.**, 961 P.2d 504, 507 (Colo. App. 1997) (pro rata liability statute was not applicable to action by sellers of real estate against purchasers and broker alleging breach of contract and breach of fiduciary duty).

4. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with section 13-21-111.5(3). **Redden v. SCI Colo. Funeral Servs. Inc.**, 38 P.3d 75 (Colo. 2001); **B.G.’s, Inc. v. Gross**, 23 P.3d 691 (Colo. 2001); **Nat’l Farmers Union Prop. & Cas. Co. v. Frackelton**, 662 P.2d 1056 (Colo. 1983); **Thomson v. Colo. & E.R.R.**, 852 P.2d 1328 (Colo. App. 1993). However, the defendant’s failure to give proper statutory notice of the nonparty does not preclude a defendant from contending at trial that the plaintiff’s damages were solely caused by the negligence of a third party and not by the negligence of the defendant. **Redden**, 38 P.3d at 81. In these circumstances, the name or other identification of the nonparty whose conduct may be involved will not appear on the verdict form for an allocation of negligence or fault. *See* **Thomson**, 852 P.2d at 1330.

5. To be properly designated under section 13-21-111.5(3), a

nonparty need not have been engaged in the same kind of tortious conduct as the defendant. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). However, generally, a party designated under section 13-21-111.5(3) must have owed a duty recognized at law to the injured party. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); *see also* **Fried v. Leong**, 946 P.2d 487 (Colo. App. 1997) (when plaintiff seeks damages for aggravation of preexisting condition, liability cannot be prorated among nonparties whose conduct merely created the preexisting condition, nor can liability be prorated among nonparties who breached no duty to the plaintiff, even though their conduct contributed to the preexisting condition). It is not proper to prorate liability between a defendant and a nonparty where the designating defendant fails to establish a prima facie case that the nonparty owed and breached a legal duty to the plaintiff. **Stone v. Satriana**, 41 P.3d 705 (Colo. 2002); **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997) (liability may be apportioned between a defendant and a designated nonparty only if admissible evidence has been presented showing that nonparty contributed to the plaintiff's injuries).

6. Where a settlement is reached with one or more parties, the damages are reduced by the percentage of negligence or fault attributed to the settling defendants, now designated nonparties. **Smith v. Zufelt**, 880 P.2d 1178 (Colo. 1994).



## **CHAPTER 5. GENERAL INSTRUCTIONS RELATING TO DAMAGES**

- 5:1 Damages Not to Be Inferred
- 5:2 Affirmative Defense—Failure to mitigate
- 5:3 Affirmative Defense—Nonuse of Safety Belt
- 5:4 Exemplary or Punitive Damages
- 5:5 Determining Life Expectancy—Mortality Table
- 5:6 Uncertainty as to Amount of Damages
- 5:7 Damages for Wrong of Another

### **5:1 DAMAGES NOT TO BE INFERRED**

**The fact that an instruction on measure of damages has been given to you does not mean that the Court is instructing the jury to award or not to award damages. The question of whether or not damages are to be awarded is a question for the jury's consideration.**

#### **Notes on Use**

This instruction must be appropriately modified, or should not be given, in any case where the plaintiff is suing on a cause of action which, if proved, entitles the plaintiff to recover at least nominal damages. *See, e.g.*, Instructions 18:4, 20:4.

#### **Source and Authority**

This instruction is supported by **Sonoco Products Co. v. Johnson**, 23 P.3d 1287 (Colo. App. 2001).



## 5:2 AFFIRMATIVE DEFENSE—FAILURE TO MITIGATE

If you find that the plaintiff, *(name)*, has had actual damages, then you must consider whether the defendant, *(name)*, has proved (his) (her) (its) affirmative defense of plaintiff's failure to mitigate or minimize damages. The plaintiff has the duty to take reasonable steps under the circumstances to mitigate or minimize (his) (her) (its) damages. Damages, if any, caused by plaintiff's failure to take such reasonable steps cannot be awarded to the plaintiff.

This affirmative defense is proved if you find (both) (all) of the following have been proven by a preponderance of the evidence:

1. The plaintiff failed to *(if supported by sufficient evidence, insert appropriate description of that conduct which, under the applicable law of contracts or torts, etc., the plaintiff had an affirmative duty to undertake in order to mitigate any particular damages, e.g., "seek such medical attention for his claimed back injury as a reasonable person would have sought under the same or similar circumstances")*;

(2. *Insert, if necessary, appropriate descriptions of any additional qualifications the law places on the particular duty of mitigation being claimed, e.g., one of the qualifications on the duty to mitigate damages by undergoing surgery is that such surgery not involve a substantial hazard*);

3. The plaintiff had ([some] [increased]) ([injuries] [damages] [losses]) because (he) (she) (it) did not *(insert language of "reasonable steps" alleged)*.

If you find that any one or more of these propositions has not been proved by a preponderance of the evidence, then you shall make no deduction from plaintiff's damages.

On the other hand, if you find that (both) (all) of

these propositions have been proved by a preponderance of the evidence, then you must determine the amount of damages caused by the plaintiff's failure to take such reasonable steps. This amount must not be included in your award of damages.

#### Notes on Use

1. Use whichever parenthesized or bracketed words are appropriate.
2. Omit the parenthesized second paragraph unless the duty which it is claimed the plaintiff failed to perform has been defined by the case law more specifically than the general duty set out in the first paragraph and the statement of that general duty alone would not be sufficient to describe adequately the law applicable to the evidence in the case.
3. This instruction should not be given unless the party asserting the duty to mitigate has properly pleaded the duty and there is sufficient evidence on the issue. C.R.C.P. 8(c); **Fair v. Red Lion Inn**, 943 P.2d 431 (Colo. 1997); **Mesa Sand & Gravel Co. v. Landfill, Inc.**, 759 P.2d 757 (Colo. App. 1988), *rev'd on other grounds*, 776 P.2d 362 (Colo. 1989); **First Nat'l Bank v. Gilbert Marshall & Co.**, 780 P.2d 73 (Colo. App. 1989). Since mitigation is an affirmative defense, the burden of proof on the issue is on the party who asserts it. **U.S. Welding, Inc. v. Advanced Circuits, Inc.**, 2018 CO 56, ¶ 16, 420 P.3d 278; **Fair**, 943 P.2d at 437; **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Hedgecock v. Stewart Title Guar. Co.**, 676 P.2d 1208 (Colo. App. 1983); **Billings v. Boercker**, 648 P.2d 172 (Colo. App. 1982). Consequently, when this instruction is given, Instruction 3:1 must also be given and an appropriate reference to mitigation as an affirmative defense should be made in the "Statement of the Case to be Determined" instruction, *see* Chapter 2. However, although mitigation is an affirmative defense, only rarely, if ever, when established will it be a complete defense against a claim. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of Instructions such as 9:1, 17:1, 20:1, or 30:10.
4. When appropriate to the evidence in the case, Instruction 5:6 (uncertainty as to amount of damages) should also be given with this instruction.
5. Section 42-4-237(7), C.R.S., provides that in certain motor-vehicle accidents, evidence of an injured person's failure to comply with the mandatory seat belt law is admissible to show that the injured person failed to mitigate damages for "pain and suffering." In such cases, Instruction 5:3 should be used, together with such special interrogatories as may be necessary to determine all relevant questions of fact. *See* Notes on Use to Instruction 5:3.
6. If appropriate to the evidence in the case, this instruction may be



modified by specifying whether the alleged failure to mitigate damages relates to economic or to noneconomic damages. *See* Instruction 6:1.

7. For mitigation of damages in an outrageous conduct action, see Note on Use 3 to Instruction 23:6. For mitigation of damages in a defamation action, see Instruction 22:26 and its Notes on Use. For mitigation of damages in a wrongful discharge case, see Instruction 31:8.

### Source and Authority

1. This instruction is supported by **United States Welding**, 2018 CO 56, ¶ 16; **Fair**, 943 P.2d at 437; **Ballow v. PHICO Insurance Co.**, 878 P.2d 672 (Colo. 1994) (breach of contract to provide medical malpractice insurance, false representation and bad faith breach of insurance contract); **Intermill v. Heumesser**, 154 Colo. 496, 391 P.2d 684 (1964) (personal injury); **Valley Development Co. v. Weeks**, 147 Colo. 591, 364 P.2d 730 (1961) (crop damage); **Bodo v. Logan**, 145 Colo. 474, 358 P.2d 889 (1961) (personal injury); **City & County of Denver v. Noble**, 124 Colo. 392, 237 P.2d 637 (1951) (condemnation); **Hoehne Ditch Co. v. John Flood Ditch Co.**, 76 Colo. 500, 233 P. 167 (1925) (breach of contract); **Saxonia Mining & Reduction Co. v. Cook**, 7 Colo. 569, 4 P. 1111 (1884) (breach of contract action by employee for wrongful discharge by employer); **Mining Equipment, Inc. v. Leadville Corp.**, 856 P.2d 81 (Colo. App. 1993) (lease of mining equipment); **Technical Computer Services, Inc. v. Buckley**, 844 P.2d 1249 (Colo. App. 1992); **Pomeranz v. McDonald's Corp.**, 821 P.2d 843 (Colo. App. 1991) (duty of landlord to mitigate damages following breach of lease by tenant), *aff'd in part, rev'd in part on other grounds*, 843 P.2d 1378 (Colo. 1993); **Bert Bidwell Investment Corp. v. LaSalle & Schiffer, P.C.**, 797 P.2d 811 (Colo. App. 1990) (unreasonable refusal to consent to assignment of lease); **Gross v. Knuth**, 28 Colo. App. 188, 471 P.2d 648 (1970) (negligent performance of contract).

2. While one does have a duty to mitigate damages, this means only that reasonable means must be used. **Fair**, 943 P.2d at 437; **Lascano v. Vowell**, 940 P.2d 977 (Colo. App. 1996); **Berger v. Sec. Pac. Info. Sys., Inc.**, 795 P.2d 1380 (Colo. App. 1990); *see also* **Burt v. Beautiful Savior Lutheran Church**, 809 P.2d 1064 (Colo. App. 1990) (affirming denial of mitigation instruction where plaintiffs' financial condition rendered them unable to incur initial repair costs). Generally, what constitutes reasonable means is a question of fact for the trier of fact to determine. **Fair**, 943 P.2d at 437; **Francis v. Dahl**, 107 P.3d 1171 (Colo. App. 2005) (ten-year-old child, who was financially dependent on her mother, had no duty as a matter of law to mitigate her damages by seeking medical care for her injuries); **Westec Constr. Mgmt. Co. v. Postle**, 68 P.3d 529 (Colo. App. 2002). Thus, for example, one is not required "to submit to surgery which involves substantial hazards or which offers only a possibility of cure." **Hildyard v. W. Fasteners, Inc.**, 33 Colo. App. 396, 404, 522 P.2d 596, 600 (1974).

3. "[A]n aggrieved party cannot be required to accept offers from

the breaching party if such offers are ‘conditioned on surrender by the injured party of his claim for breach.’ ” **U.S. Welding**, 2018 CO 56, ¶ 9, 420 P.3d at 280 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. e (1981)). Thus, the duty to mitigate does not oblige a party aggrieved by a breach of contract to accept an offer from the breaching party that relinquishes the aggrieved party’s rights under the original contract. *Id.*

4. “[A] failure to mitigate is an affirmative defense only with regard to damages that could have been reasonably avoided, and the effect of that defense is to bar recovery from the breaching party of damages that need never have been suffered, notwithstanding its breach.” *Id.* at ¶ 20, 420 P.3d at 283.

5. “[E]vidence of plaintiff’s failure to wear a protective helmet [when riding a motorcycle] is inadmissible to show negligence on the part of the injured party or to mitigate damages.” **Dare v. Sobule**, 674 P.2d 960, 963 (Colo. 1984); *accord* **Lawrence v. Taylor**, 8 P.3d 607 (Colo. App. 2000). Further, when evidence of a failure to wear a protective helmet is received, the plaintiff is entitled to a cautionary instruction that such failure does not constitute contributory negligence, even though the plaintiff may not have objected to such evidence and the defendant did not seek to use such evidence as a defense. **Dare**, 674 P.2d at 963-64.

6. A plaintiff, otherwise entitled to relief, is also entitled to recover as consequential damages, expenses and other costs incurred in taking reasonable steps to mitigate damages. **Gundersons, Inc. v. Tull**, 678 P.2d 1061 (Colo. App. 1983), *aff’d in part, rev’d in part on other grounds*, 709 P.2d 940 (Colo. 1985).

7. A plaintiff has no duty to anticipate a tortfeasor’s illegal acts and, therefore, has no duty to mitigate damages until after the original injury has occurred. **Burt**, 809 P.2d at 1068.

8. In an attorney malpractice action, a failure by the client or successor counsel to appeal an adverse judgment “can never be a failure to mitigate damages caused by malpractice at trial.” **Stone v. Satriana**, 41 P.3d 705, 712 (Colo. 2002).

9. A parent’s failure to mitigate damages arising out of injuries to a child cannot be imputed to the child. **Francis v. Dahl**, 107 P.3d 1171 (Colo. App. 2005).

10. As part of the duty to mitigate, a landlord must make reasonable efforts to re-lease a premises following an eviction. **Zeke Coffee, Inc. v. Pappas-Alstad P’ship**, 2015 COA 104, ¶ 30, 370 P.3d 261 (citing **Schneiker v. Gordon**, 732 P.2d 603 (Colo. 1987)).

11. A failure to mitigate instruction is not warranted when it is alleged that the plaintiff continued to undergo expensive treatment that



was not resolving her pain. **Banning v. Prester**, 2012 COA 215, ¶¶ 13-14, 317 P.3d 1284, 1288 (jury instruction that failure to mitigate damages had been proved if plaintiff “continued to undergo expensive treatment when it was not resolving her pain” was error).

### 5:3 AFFIRMATIVE DEFENSE—NONUSE OF SAFETY BELT

The defendant has the burden of proving by a preponderance of the evidence that the plaintiff failed to wear an available safety belt. You shall not award those noneconomic damages that you find were caused by the plaintiff's failure to wear a safety belt. Noneconomic damages are those defined in Instruction \_\_\_\_\_ (insert the number assigned in the case to the instruction that sets forth Instruction 6:1 paragraph 1 for adults or 6:2 paragraph 1 for minor children).

#### Notes on Use

1. The Notes on Use to Instruction 5:2 are also applicable to this instruction. If the failure to use a safety belt is not the only claimed breach of a duty to mitigate damages, Instruction 5:2, appropriately modified, should be used with this instruction.

2. Section 42-4-237(2), C.R.S., requires that “[u]nless exempted pursuant to subsection (3) of this section, every driver of and every front seat passenger in a motor vehicle and every driver of and every passenger in an autocycle equipped with a safety belt system shall wear a fastened safety belt while the motor vehicle is being operated on a street or highway in this state.” Where a vehicle has been equipped with a lap and shoulder belt, both must be worn to comply with the statute. **Carlson v. Ferris**, 85 P.3d 504 (Colo. 2003). Ordinarily, whether any of the exemptions from the requirement of wearing a seat belt set forth in section 42-4-237(3) are applicable will be determined by the court as a matter of law. However, if factual questions are presented, this instruction should be appropriately modified.

3. A defendant is entitled to the safety-belt instruction if he or she comes forward with competent evidence of safety-belt nonuse even if there is limited or no evidence of a causal relationship between the claimed injury and the non-use of the safety belt. **Anderson v. Watson**, 953 P.2d 1284 (Colo. 1998). The parties may leave it to the jury's common sense to apportion pain and suffering damages between injuries associated with seat belt non-use and other injuries, or elect to present expert testimony on the issue. *Id.*

4. This instruction should not be given if the evidence is insufficient to establish that a statutory violation occurred. *See, e.g., Jackson v. Moore*, 883 P.2d 622 (Colo. App. 1994) (truck driver not required to wear safety belt when truck parked on side of road with its engine running).

5. The phrase “pain and suffering” in section 42-4-237(7) includes a broad range of noneconomic damages, including inconvenience, emotional stress, and impairment of quality of life, but not damages for physical impairment and disfigurement. **Pringle v. Valdez**, 171 P.3d 624 (Colo. 2007).

#### Source and Authority

1. This instruction is supported by section 42-4-237(7). *See also Pringle*, 171 P.3d at 628-29; **Anderson**, 953 P.2d at 1291.

2. In product liability actions, evidence of the failure to use a safety belt is limited to showing that the plaintiff failed to mitigate his or her damages for pain and suffering, and is not to be considered in deciding comparative fault. **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993).

## 5:4 EXEMPLARY OR PUNITIVE DAMAGES

If you find in favor of the plaintiff, (*name*), on (his) (her) (its) claim of claim of (*describe the plaintiff's claim, e.g., "battery"*), then you shall consider whether the plaintiff should recover punitive damages against the defendant. If you find beyond a reasonable doubt that the defendant acted in a (fraudulent) (malicious) (willful and wanton) manner, in causing the plaintiff's (injuries) (damages) (losses) you shall determine the amount of punitive damages, if any, that the plaintiff should recover.

Punitive damages, if awarded, are to punish the defendant and to serve as an example to others.

### Notes on Use

1. In cases involving speech or expressive conduct, see the Notes on Use to Instruction 22:27 for First Amendment limitations.
2. This instruction, appropriately modified, may also be used in statutory actions brought under section 13-21-106.5, C.R.S., for civil damages caused by bias-motivated crime (formerly ethnic intimidation). Section 13-21-106.5(3) requires a different state of mind be proved than that set out in the instruction. Also, if awarded, the punitive damages are not subject to the statutory limitations set out in either section 13-21-102 or section 13-21-102.5, C.R.S.

### Source and Authority

1. This instruction is based on sections 13-21-102 and 13-25-127, C.R.S.
2. The second paragraph of this instruction is based on **White v. Hansen**, 837 P.2d 1229 (Colo. 1992). See also **Barnes v. Lehman**, 118 Colo. 161, 193 P.2d 273 (1948); **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (1975).

### Related Instructions

3. Instruction 3:3 defining "reasonable doubt" should be used with this instruction. Also, when the parenthesized phrase "willful and wanton conduct" is used, Instruction 9:30 defining "willful and wanton" should be used with this instruction.

### Constitutional Limitations

4. In a series of decisions, beginning with **Pacific Mutual Life**



**Insurance Co. v. Haslip**, 499 U.S. 1 (1991), the Supreme Court has recognized limitations on awards of punitive damages in civil actions based upon the Due Process Clause of the Fourteenth Amendment. Although the Court's decisions have recognized both procedural and substantive due process limitations, most of the Court's jurisprudence in this area is focused upon substantive limitations on the size of the awards, according to the three basic guideposts demarked and explicated in **BMW of North America, Inc. v. Gore**, 517 U.S. 559 (1996): (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between actual harm or potential harm to the plaintiff and the punitive damages award; and (3) a comparison between the punitive damages awarded and civil or criminal penalties imposed in comparable cases. In terms of procedural due process, the early decisions imposed relatively mild strictures on instructions to the factfinder, suggesting that they only need "enlighte[n] the jury as to the punitive damages' nature and purpose, identif[y] the damages as punishment for civil wrongdoing of the kind involved, and explai[n] that their imposition was not compulsory." **Haslip**, 499 U.S. at 19.

5. In **Cooper Industries, Inc., v. Leatherman Tool Group, Inc.**, 532 U.S. 424 (2001), the Court reiterated that the **Gore** factors must be reviewed de novo by appellate courts reviewing punitive damage awards.

6. In **State Farm Mutual Automobile Insurance Co. v. Campbell**, 538 U.S. 408 (2003), the Court linked substantive due process limitations with procedural due process requirements and strongly suggested that in some cases the substantive limitations on punitive damage awards should be provided in jury instructions to ensure that the punitive damages awards initially granted by a jury comport with constitutional standards.

7. As **Campbell** requires, evidence of acts offered to show the defendant's culpability as a recidivist should be limited to those that are similar to the acts that caused the plaintiff's injuries and tend to prove that the latter acts were reprehensible. *Id.* at 423. Moreover, evidence of acts committed by the defendant in jurisdictions in which those acts were not unlawful should not be admitted unless such evidence tends to prove that defendant's acts that caused the plaintiff's injuries were reprehensible; in that case the evidence should be admitted with such cautionary instructions as the court deems necessary to limit its consideration by the jury accordingly. *Id.* at 422. The court should carefully consider the admission of evidence of other acts by the defendant as evidence of reprehensibility in light of the caution urged by the Supreme Court in the **Campbell** decision.

8. If evidence that would establish any of the factors that any of the **Campbell** line of cases has recognized as indicative of the fact or degree of reprehensibility is admitted, this instruction may need to be modified to include that factor.

9. In **Philip Morris USA v. Williams**, 549 U.S. 346 (2007), the Court held that the Due Process Clause prohibits a state from punishing a defendant for injury inflicted upon nonparties to the litigation. Nonetheless, a plaintiff may demonstrate reprehensibility by showing harm to others. The jury should be instructed regarding this distinction.

10. In **Qwest Services Corp. v. Blood**, 252 P.3d 1071 (Colo. 2011), the Colorado Supreme Court reviewed and applied the U.S. Supreme Court cases and held that Colorado's punitive damages statute, § 13-21-102, was not unconstitutional, either facially or as applied. Under **Philip Morris**, evidence of harm to nonparties is relevant to demonstrate the reprehensibility of the defendant's actions. Subsection 13-21-102(1)(b) complies with the holding in **Phillip Morris** to the extent it permits the jury to consider the "rights and safety of others" in assessing the willful and wanton nature of the defendant's conduct. Further, nothing in **Phillip Morris** suggested that the state's punitive damages statute must expressly limit a jury's use of nonparty harm. As for an as-applied challenge under **Phillip Morris** to a punitive damages award, a defendant must request a limited-purpose instruction in order to preserve such a challenge. When such an instruction is given, absent evidence to the contrary, the court is to presume the jury followed that instruction.

11. The court in **Qwest Services Corp.** applied the **Gore** guideposts, including the reprehensibility criteria set forth in **Campbell**, in finding that the punitive damages award comported with substantive due process requirements.

### **Statutory Provisions**

12. The general purposes of punitive damages under section 13-21-102 are to punish the defendant and deter similar offenses by the defendant or others. **Coors v. Sec. Life of Denver Ins. Co.**, 112 P.3d 59 (Colo. 2005).

13. Section 13-21-102(1)(a) provides that punitive damages, when awarded by a jury, may not exceed the amount of the actual damages awarded. *See, e.g., Hensley v. Tri-QSI Denver Corp.*, 98 P.3d 965 (Colo. App. 2004). However, based on certain determinations, the court may increase an award for punitive damages to a sum not to exceed three times the amount of the actual damages, § 13-21-102(3), or may reduce or disallow an award of punitive damages, § 13-21-102(2). *See, e.g., Coors*, 112 P.3d at 65-66; **Vickery v. Vickery**, 271 P.3d 516 (Colo. App. 2010) (statute allowing punitive damages is permissive), *rev'd on other grounds sub nom Vickery v. Evans*, 266 P.3d 390 (Colo. 2011); **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010) (trial judge may decline to award punitive damages even if statutory requirements are met); **Tait v. Hartford Underwriters Ins. Co.**, 49 P.3d 337 (Colo. App. 2001) (in determining whether to increase punitive damages award pursuant to section 13-21-102(3)(a), the trial court properly focused on litigation conduct of defendant). The



“actual damages” to which an award of punitive damages are statutorily limited include any prejudgment interest. **Vickery**, 266 P.3d at 394. The cap on punitive damages limits recovery in an abuse of process and outrageous conduct case based on retaliatory conduct, even though the retaliation statute itself provides for treble damages and expressly does not limit the amount of recovery available in a civil action. **Palmer v. Diaz**, 214 P.3d 546 (Colo. App. 2009). Because the amount of punitive damages determined by the jury may be increased or decreased as the court may decide, the jury is not instructed about the effect of their determination, *see* § 13-31-102.5 (4), C.R.S. Section 13-21-102(1)(b) sets out a definition of “willful and wanton conduct” that has been incorporated into Instruction 9:30. Under section 13-21-102(6), evidence of the income or net worth of a party may not be considered in determining the appropriateness or amount of punitive damages. The provisions of section 13-21-102 apply equally to punitive damages awarded by a jury or by a judge. **Sky Fun 1, Inc. v. Schuttloffel**, 27 P.3d 361 (Colo. 2001).

14. Before the court increases a punitive damages award under section 13-21-102(3), it must conduct a hearing if requested. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009), *aff’d on other grounds*, 252 P.3d 1071 (Colo. 2011). Following such a hearing, the trial court must make findings regarding whether the defendant acted in a willful and wanton manner and, if it increases the punitive damages award, it must address the **Gore** due process factors.

15. Section 13-25-127(2) provides that in order to recover punitive damages, the conduct complained of must be established “beyond a reasonable doubt.”

16. Under section 13-21-102(1.5)(a), “[a] claim for exemplary damages in an action governed by this section [13-21-102] may not be included in any initial claim for relief. A claim for [such damages] may be allowed by amendment to the pleadings only after the exchange of initial disclosures pursuant to Rule 26 of the Colorado Rules of Civil Procedure and the plaintiff establishes prima facie proof of a triable issue. . . . , the court may, in its discretion, allow additional discovery on the issue of exemplary damages as the court deems appropriate.” For procedural and substantive limitations applicable to claims for punitive damages in wrongful death actions, *see* section 13-21-203(3)-(5), C.R.S., and for such limitations in actions against health care professionals, *see* section 13-64-302.5, C.R.S. *See also* Notes on Use below under the heading, “Other Statutes.”

17. Additional limitations on the recovery of punitive damages may be applicable when such recovery is sought against a volunteer of a nonprofit organization or governmental entity “in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer’s responsibilities to” the organization or entity. 42 U.S.C.

§ 14503(f)(1) (2018). For the applicable limitations, see 42 U.S.C. §§ 14503(f). When applicable, this and related instructions on damages must be modified as appropriate. *See generally* Volunteer Protection Act of 1997, 42 U.S.C. § 14501 to -505 (2018).

### **Sufficiency of Evidence**

18. Punitive damages may not be awarded if there is insufficient evidence to support them. **Coors**, 112 P.3d at 65-66 (Punitive damages may be awarded only “where the party asserting the claim proves beyond a reasonable doubt that the injury sustained was attended by circumstances of fraud, malice, or willful and wanton conduct. . . . Where the defendant is conscious of his conduct and the existing conditions and knew or should have known that injury would result, the statutory requirements of section 13-21-102 are met.”); **Tri-Aspen Constr. Co. v. Johnson**, 714 P.2d 484, 488 (Colo. 1986) (conduct “that is merely negligent . . . cannot serve as the basis for exemplary damages”); **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985) (to recover punitive damages, plaintiff must show beyond a reasonable doubt that the defendant knew or should have known that injury would probably result from his or her actions, or that the defendant acted with an evil intent and with the purpose of injuring the plaintiff or with such a wanton and reckless disregard of the plaintiff’s rights as to demonstrate a wrongful motive); **Palmer v. A.H. Robins Co.**, 684 P.2d 187 (Colo. 1984) (defendant’s action was purposefully performed with an awareness of the risk and in disregard of the consequences); **Blood**, 224 P.3d at 314 (although simple negligence may not support an award of punitive damages, “where a defendant is conscious of both its conduct and the existing conditions, and knew or should have known that injury would result, the requirements of section 13-21-102 are met”); **Miller v. Byrne**, 916 P.2d 566, 580 (Colo. App. 1995) (“[w]illful and wanton conduct means conduct purposefully committed which the actor must have realized is dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly of the plaintiff”); *see also* **Eurpac Serv. Inc. v. Republic Acceptance Corp.**, 37 P.3d 447 (Colo. App. 2000) (mere taking of another’s property under an erroneous claim of right and over the protest of the owners was insufficient to permit an award of punitive damages); **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999); **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993) (declining to apply a “knew or should have known” standard in determining whether an award of punitive damages is justified).

19. Whether the evidence is sufficient to justify an award of punitive damages is a question of law. **Qwest Servs. Corp.**, 252 P.3d at 1092; **Coors**, 112 P.3d at 66; **Archer v. Farmer Bros. Co.**, 70 P.3d 495 (Colo. App. 2002), *aff’d on other grounds*, 90 P.3d 228 (Colo. 2004); **Razi v. Schmitt**, 36 P.3d 102 (Colo. App. 2001) (punitive damages were properly awarded against arsonist even though arsonist had been punished in criminal justice system for the arson); **Ajay Sports, Inc. v. Casazza**, 1 P.3d 267 (Colo. App. 2000); **Miller**, 870 P.2d at 568. In



deciding this question, the court must consider the totality of the evidence viewed in the light most supportive of the punitive damages award. **Qwest Servs. Corp.**, 252 P.3d at 1092; **Coors**, 112 P.3d at 66; **Eurpac Serv. Inc.**, 37 P.3d at 452. However, where the evidence is sufficient, whether to award such damages rests in the discretion of the trier of fact. **Coors**, 112 P.3d at 67; **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994); **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993); *see also* **Qwest Servs. Corp.**, 252 P.3d at 1076 (jury could find, beyond a reasonable doubt, that the defendant consciously forewent a periodic pole inspection program and knew or should have known that this conduct would probably result in injury); **Mince v. Butters**, 200 Colo. 501, 616 P.2d 127 (1980); **Eads v. Dearing**, 874 P.2d 474 (Colo. App. 1993).

20. Also, if there is insufficient evidence to support a finding of “fraud” or “malice,” these elements should be omitted from the instruction. The “circumstances of fraud” referred to in the instruction are identical to the elements of a claim based on fraud. *See, e.g.*, **Berger v. Sec. Pac. Info. Sys., Inc.**, 795 P.2d 1380 (Colo. App. 1990) (jury’s finding that elements of fraud were established also established the “circumstances of fraud” required for punitive damages); *see also* **Amber Props., Ltd. v. Howard Elec. & Mech. Co.**, 775 P.2d 43 (Colo. App. 1988). “Malice” may include vindictiveness and retaliatory motives. **Bonidy v. Vail Valley Ctr. for Aesthetic Dentistry, P.C.**, 232 P.3d 277 (Colo. App. 2010).

21. Ordinarily, in determining punitive damages, a jury should not be permitted to consider evidence of a defendant’s conduct that occurred after the events giving rise to liability. **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998). *But see* **Jones v. Cruzan**, 33 P.3d 1262 (Colo. App. 2001) (defendant’s conduct in fleeing scene of automobile accident was admissible on issue of punitive damages because it was relevant to show defendant’s state of mind at time of accident). However, the court may permit evidence of offenses that occurred before the events giving rise to liability for purposes of exemplary damages. *See* **Alhilo v. Kliem**, 2016 COA 142, ¶ 40, 412 P.3d 902 (no abuse of trial court’s discretion in permitting evidence of defendant’s prior alcohol offenses for purposes of exemplary damages).

### **Breach of Contract**

22. Punitive damages are not recoverable for breach of contract. **Decker v. Browning-Ferris Indus., Inc.**, 947 P.2d 937 (Colo. 1997); **Decker v. Browning-Ferris Indus., Inc.**, 931 P.2d 436 (Colo. 1997); **Ballow**, 878 P.2d at 682; **Mortg. Fin., Inc. v. Podleski**, 742 P.2d 900 (Colo. 1987); **Watson v. Cal-Three, LLC**, 254 P.3d 1189 (Colo. App. 2011) (award of punitive damages vacated where counterclaim plaintiff prevailed only on its claim for breach of contract and breach of covenant of good faith and fair dealing, and did not prevail on its claim for tortious interference with contract); **Parr v. Triple L & J Corp.**, 107 P.3d 1104 (Colo. App. 2004) (trial court properly awarded punitive damages

on tort claim for intentional interference with contract and not on breach of contract claim); **Hensley v. Tri-QSI Denver Corp.**, 98 P.3d 965 (Colo. App. 2004); **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994); **William H. White Co. v. B & A Mfg. Co.**, 794 P.2d 1099 (Colo. App. 1990); **Surdyka v. DeWitt**, 784 P.2d 819 (Colo. App. 1989) (punitive damages are not recoverable for breach of contract; however, if the same conduct also constitutes a tort, punitive damages are recoverable on the tort claim).

23. Punitive damages are recoverable on a claim of bad faith breach of an insurance contract if the breach is accompanied by circumstances of fraud, malice, or willful and wanton conduct. **Ballow**, 878 P.2d at 682; **South Park Aggregates, Inc. v. Nw. Nat'l Ins. Co.**, 847 P.2d 218 (Colo. App. 1992); **Farmers Grp., Inc. v. Trimble**, 768 P.2d 1243 (Colo. App. 1988). However, establishing a claim for bad faith breach of an insurance contract is not necessarily sufficient to establish a claim for exemplary damages. *Id.*

### **Equitable Claims**

24. Punitive damages are not recoverable on claims that are equitable rather than legal in nature. **Kaitz v. Dist. Court**, 650 P.2d 553 (Colo. 1982); **Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.**, 97 P.3d 140 (Colo. App. 2003) (fraudulent conveyance claim); **Morris v. Askeland Enters., Inc.**, 17 P.3d 830 (Colo. App. 2000) (punitive damages not recoverable on a fraudulent conveyance claim under sections 38-8-101 to -112, C.R.S.); **Defeyter v. Riley**, 671 P.2d 995 (Colo. App. 1983); **Seal v. Hart**, 755 P.2d 462 (Colo. App. 1988). *But see Peterson v. McMahon*, 99 P.3d 594 (Colo. 2004) (exemplary damages properly awarded in action against trustee for misappropriation of funds; action was legal in nature since remedy sought was immediate repayment of trust funds); **Paine, Webber, Jackson & Curtis, Inc. v. Adams**, 718 P.2d 508 (Colo. 1986) (not all claims for damages for breach of duty by a fiduciary are equitable in nature); **Virdanco, Inc. v. MTS Int'l**, 820 P.2d 352 (Colo. App. 1991) (punitive damages recoverable where equitable claim for accounting was ancillary to legal claim for breach of fiduciary duty).

### **Wrongful Death**

25. Punitive damages are recoverable under section 13-21-203(3) in wrongful death actions that accrued on or after August 8, 2001. This instruction applies to these claims, subject to the special pleading rules set out in section 13-21-203(3)(c) and the special substantive provisions set out in section 13-21-203(4) through (7).

26. Punitive damages are not recoverable under section 13-20-101(1), C.R.S., in a survival action being maintained (a) after the death of a wrongdoer or (b) after the death of the person for the benefit of whose estate the action is being maintained, if the action is a tort action "based upon personal injury." **Estate of Burron v. Edwards**, 42 Colo. App. 141, 594 P.2d 1064 (1979) (construing section 13-20-101(1)).



### Product Liability

27. Punitive damages may be recoverable in a product liability action even though such an action is based on a theory of strict liability rather than fault. **Palmer**, 684 P.2d at 217-18.

### Invasion of Privacy

28. Punitive damages may be awarded on a claim for invasion of privacy. **Borquez v. Robert C. Ozer, P.C.**, 923 P.2d 166 (Colo. App. 1995), *aff'd in part, rev'd in part on other grounds*, 940 P.2d 371 (Colo. 1997).

### Civil Conspiracy

29. Punitive damages may be recoverable on a claim for civil conspiracy. *See* **Double Oak Constr.**, 97 P.3d at 149.

### Treble Damages

30. Generally, treble damages and punitive damages are not recoverable if both are premised on the same facts. **Coors**, 112 P.3d at 65 (“A plaintiff is not entitled to recover both treble damages under the Colorado Consumer Protection Act and punitive damages under section 13-21-102.”); **Lexton-Ancira Real Estate Fund, 1972 v. Heller**, 826 P.2d 819 (Colo. 1992) (plaintiff could not recover both punitive damages and treble damages on deceptive trade practices claim where both claims were predicated on the same conduct); **Hall v. Walter**, 969 P.2d 224 (Colo. 1998) (same); *cf.* **Becker & Tenenbaum v. Eagle Rest. Co.**, 946 P.2d 600 (Colo. App. 1997). The cap on punitive damages limits the damages in an action for outrageous conduct and abuse of process based on retaliatory conduct, even though the retaliation statute itself provides for treble damages and expressly does not limit the amount of recovery available in a civil action. **Palmer**, 214 P.3d at 556.

31. The appropriate standard of proof to recover treble damages under section 10-4-708(1), C.R.S., of the now-repealed No-Fault Act is by a preponderance of the evidence rather than by proof beyond a reasonable doubt as is required under section 13-25-127 to recover punitive damages. **Farmers Grp., Inc. v. Williams**, 805 P.2d 419 (Colo. 1991).

32. A trial court’s order trebling exemplary damages under section 13-21-102(3)(c) is reviewed for an abuse of discretion, rather than de novo. *See* **General Steel Domestic Sales, LLC v. Bacheller**, 2012 CO 68, ¶ 41, 291 P.3d 1.

### Comparative Negligence

33. Punitive damages are not subject to reduction by application of the comparative negligence or pro rata liability statutes. **Lira v. Davis**,

832 P.2d 240 (Colo. 1992). However, under section 13-21-102, punitive damages are limited to the amount of compensatory damages awarded after any reductions required by the comparative negligence and pro rata liability statutes. **Lira**, 832 P.2d at 245; *see also* **White**, 837 P.2d at 1236-37; **Sprung v. Adcock**, 903 P.2d 1224 (Colo. App. 1995). In addition, in the absence of a successful underlying claim for actual damages, there can be no award of punitive damages. **Concord Realty Co. v. Cont'l Funding Corp.**, 776 P.2d 1114 (Colo. 1989). Also, it is permissible to permit the jury to apportion exemplary damages among multiple defendants based upon varying degrees of culpability. **Ajay Sports**, 1 P.3d at 279.

34. In cases involving multiple plaintiffs in which each plaintiff suffers a unique and different harm, there is no requirement that the same percentage of actual damages be awarded for punitive damages as to each plaintiff. **Bennett**, 969 P.2d at 765.

### **Prejudgment Interest**

35. Prejudgment interest is not allowed on punitive damages. **Ballow**, 878 P.2d at 683; **Lira**, 832 P.2d at 246; **Seaward Constr. Co. v. Bradley**, 817 P.2d 971 (Colo. 1991); *cf.* **Becker & Tenenbaum**, 946 P.2d at 602 (prejudgment interest not allowed on award of treble damages).

### **Governmental Immunity**

36. Except as otherwise authorized under section 24-10-118(5), C.R.S., a public entity may not be held liable for punitive damages under section 24-10-114(4), C.R.S., of the Governmental Immunity Act. **Martin v. Weld County**, 43 Colo. App. 49, 598 P.2d 532 (1979); *see* **Subryan v. Regents of the Univ. of Colo.**, 789 P.2d 472 (Colo. App. 1989) (the Board of Regents is a “public entity” and, therefore, exempt from liability for punitive damages in actions brought under the Governmental Immunity Act). A public employee, however, may be liable for punitive damages if his or her acts were willful and wanton. § 24-10-118(1)(c); **Gray v. Univ. of Colo. Hosp. Auth.**, 2012 COA 113, ¶ 27, 284 P.3d 191. In an action for injuries resulting from the operation of a correctional facility or jail, because public employees are not immune from liability pursuant to section 24-10-106(1), C.R.S., the question of whether an employee’s conduct was willful and wanton for purposes of punitive damages is not for the district court to determine before trial via Rule 12(b)(1) and a **Trinity** hearing. **Hernandez v. City & Cty. of Denver**, 2018 COA 151, ¶¶ 26, 30, 439 P.3d 57.

### **Corporations**

37. Under certain circumstances, a corporation can be held liable for punitive damages because of an act of an agent. *See, e.g.*, **Fitzgerald v. Edelen**, 623 P.2d 418 (Colo. App. 1980) (applying RESTATEMENT (SECOND) OF AGENCY § 217C (1958)); *see also* **Jacobs v. Commonwealth**



**Highland Theatres, Inc.**, 738 P.2d 6 (Colo. App. 1986) (corporation liable where acts upon which punitive damages are based are those of a managerial employee acting within scope of that employment); **Appel v. Sentry Life Ins. Co.**, 701 P.2d 634 (Colo. App. 1985) (principal authorizing or approving act of agent, for which punitive damages may properly be awarded, may be held liable for such damages), *aff'd on other grounds*, 739 P.2d 1380 (Colo. 1987). *But see Voight v. Colo. Mountain Club*, 819 P.2d 1088 (Colo. App. 1991) (where there was no evidence that tortfeasor was an officer or managing agent of the defendant corporation, the defendant could not be held liable for punitive damages).

### Statute of Limitations

38. The one-year statute of limitations set out in section 13-80-103(1)(d), C.R.S., applicable to "[a]ll actions for any penalty or forfeiture of any penal statutes," does not apply to a claim for punitive damages, because the statute authorizing such damages, § 13-21-102, does not create an independent claim for relief. **Kirk v. Denver Publ'g Co.**, 818 P.2d 262 (Colo. 1991); **Palmer**, 684 P.2d at 213. Rather, the statute authorizes additional damages in certain circumstances when another claim for relief resulting in actual damages has been established. **Adams v. Paine, Webber, Jackson & Curtis, Inc.**, 686 P.2d 797 (Colo. App. 1983), *aff'd*, 718 P.2d 508 (Colo. 1986).

### Other Statutes

39. For special procedural and substantive limitations that are, or may be, applicable when a claim for punitive damages is based on a negligence claim against a health care professional, see section 13-64-302.5. To the extent any of these statutory provisions are applicable, appropriate modifications may be required in this instruction. *See, e.g.*, § 13-64-302.5(4), (5).

40. The Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S., did not abolish punitive damages in civil actions arising out of skiing injuries. **Pizza**, 711 P.2d at 684.

41. Punitive damages may be recovered against a defendant who made illegal drugs available to an illegal user and the use of such drugs caused damages to others. *See* §§ 13-21-801 to -813, C.R.S. As to the persons who may recover such damages, see section 13-21-804(1), C.R.S., and as to the persons who may be held liable for such damages, see section 13-21-804(2)(a) and (b), C.R.S.

### Survival

42. Under Colorado's survival statute, § 13-20-101(1) C.R.S., punitive damages cannot be awarded against a defendant who has died. In the event a plaintiff is awarded punitive damages at trial, but dies before formal entry of judgment, plaintiff's estate is entitled to recover

the punitive damages awarded before the plaintiff's death. **Guar. Tr. Life Ins. Co. v. Estate of Casper**, 2018 CO 43, ¶¶ 19–21, 418 P.3d 1163.

### **Employer Liability**

43. When an employer has acknowledged respondeat superior liability for the negligence of its employee, punitive damages cannot be asserted against the employer based on a direct negligence claim, such as negligent supervision, hiring, retention, or entrustment. **Ferrer v. Okbamicael**, 2017 CO 14M, ¶ 45, 390 P.3d 836 (subsequently abrogated by section 13-21-111.5(1.5), C.R.S., effective for cases filed on or after September 7, 2021).

## 5:5 DETERMINING LIFE EXPECTANCY— MORTALITY TABLE

At the beginning of this trial, plaintiff, (*name*), had a life expectancy of (*insert appropriate number of years*) years. This expectancy is taken from the United States census bureau mortality table. This table is not conclusive but may be considered together with other evidence relating to the plaintiff's health, habits, and occupation.

### Notes on Use

1. This instruction assumes the age of the party seeking to use this instruction is not in dispute. If the party's age is disputed, this instruction must be appropriately modified.

2. This instruction should not be given unless there is sufficient evidence that the plaintiff's injuries will be permanent. *See Alcon v. Spicer*, 113 P.3d 735 (Colo. 2005); *Rio Grande S. R.R. v. Nichols*, 52 Colo. 300, 123 P. 318 (1912).

3. In a wrongful death case, when this instruction is given in reference to the deceased, the word "decendent," "deceased," or the name of the deceased should be substituted for the word "plaintiff," and the date of death should be used as the beginning measuring date for the life expectancy.

4. The use of the most recent United States census bureau mortality table is mandated by section 13-25-102, C.R.S.

### Source and Authority

This instruction is supported by section 13-25-102 and the cases cited in the Notes on Use. *See also Colo. Fuel & Iron Corp. v. Indus. Comm'n*, 148 Colo. 557, 367 P.2d 597 (1961); *City of Ft. Collins v. Smith*, 84 Colo. 511, 272 P. 6 (1928).



## 5:6 UNCERTAINTY AS TO AMOUNT OF DAMAGES

**Difficulty or uncertainty in determining the precise amount of any damages does not prevent you from deciding an amount. You should use your best judgment based on the evidence.**

### Notes on Use

1. In most cases, this instruction should be given only when there is sufficient evidence of the cause and existence of damages. **Donahue v. Pikes Peak Auto. Co.**, 150 Colo. 281, 372 P.2d 443 (1962). When there is such evidence, the proper test for then determining the sufficiency of the evidence for calculating the amount of such damages is “whether there is a reasonable basis in the evidence from which the finders of fact may compute damages.” **Accutool Precision Machining, Inc. v. Denver Metal Finishing**, 680 P.2d 861, 864 (Colo. App. 1984). “The law permits the approximation of the amount of damages provided the fact of damage is certain.” **W. Conference Resorts, Inc. v. Pease**, 668 P.2d 973, 977 (Colo. App. 1983).

2. This instruction applies to amounts of damages that may be involved in issues of mitigation under Instruction 5:2, as well as amounts that may be involved for various elements of damage under the plaintiff’s claim for relief.

3. This instruction does not apply to breach of contract claims for liquidated damages. *See* Instruction 30:40.

4. When this instruction is given, Instruction 3:4 should also be given. **Cox v. Public Serv. Co.**, 30 Colo. App. 350, 494 P.2d 1302 (1971).

### Source and Authority

This instruction is supported by **Denny Construction, Inc. v. City & County of Denver**, 199 P.3d 742 (Colo. 2009) (lost profits in contract case due to impaired bonding capacity not speculative as a matter of law); **Acoustic Marketing Research, Inc. v. Technics, LLC**, 198 P.3d 96 (Colo. 2008) (future lost royalties not speculative as a matter of law, and proved with reasonable certainty); **Vanderbeek v. Vernon Corp.**, 50 P.3d 866 (Colo. 2002) (rule precluding recovery of uncertain or speculative damages applies only when the fact of damages is uncertain, not where amount is uncertain); **Peterson v. Colorado Potato Flake & Manufacturing Co.**, 164 Colo. 304, 435 P.2d 237 (1967); **Riggs v. McMurtry**, 157 Colo. 33, 400 P.2d 916 (1965); **Donahue**, 150 Colo. at 287, 372 P.2d at 447; **Colorado National Bank v. Ashcraft**, 83 Colo. 136, 263 P. 23 (1927); **Schuessler v. Wolter**, 2012 COA 86, ¶ 48, 310 P.3d 151 (amount of damages need not be determined by mathematical formula; it may be an approximation if the fact of



damages is certain and there is some evidence from which the jury could make a reasonable estimation); **Sterebuch v. Goss**, 266 P.3d 428 (Colo. App. 2011); **Margenau v. Bowlin**, 12 P.3d 1214 (Colo. App. 2000) (amount of damages need not be determined by mathematical formula); **Phillips v. Monarch Recreation Corp.**, 668 P.2d 982 (Colo. App. 1983); and **Brittis v. Freemon**, 34 Colo. App. 348, 527 P.2d 1175 (1974).

## 5:7 DAMAGES FOR WRONG OF ANOTHER

If you find that the natural and probable consequence of a wrongful act by the defendant, (*name*), was to involve the plaintiff, (*name*), in litigation with others, the plaintiff may recover from the defendant the reasonable expenses of that litigation.

### Notes on Use

1. This instruction, premised on the wrong-of-another doctrine, is an acknowledgement that the litigation costs incurred by a party in separate litigation may sometimes be an appropriate measure of compensatory damages against another party. It does not, however, establish a stand-alone cause of action. A wrong-of-another claim must be premised on either the existence of a duty owed by the defendant to the plaintiff or some other legal entitlement to recover, other than the mere fact that the plaintiff incurred damages in the form of attorneys' fees. **Rocky Mtn. Festivals, Inc. v. Parsons Corp.**, 242 P.3d 1067 (Colo. 2010).

2. Where the claims for which a plaintiff seeks wrong-of-another damages cannot be distinguished from the remainder of the underlying dispute, no damages are recoverable. If, however, one party's wrong results in the plaintiff's litigation of distinct and segregable claims against another party, the litigation costs associated with those claims are recoverable. *Id.*

3. This instruction may be given in conjunction with Instruction 24:7, concerning damages arising from interference with contract.

### Source and Authority

This instruction is supported by **Rocky Mountain Festivals**, 242 P.3d at 1073-74 (damages under wrong-of-another doctrine may be recovered where one party's wrong results in the litigation of distinct and segregable claims against another party); **Bernhard v. Farmers Insurance Exchange**, 915 P.2d 1285 (Colo. 1996) (discussing the broad range of applications of the wrong-of-another doctrine in Colorado); **Brochner v. Western Insurance Co.**, 724 P.2d 1293 (Colo. 1986) (wrong-of-another doctrine is applicable only if the party seeking attorneys' fees was without fault as to the underlying action); **Elijah v. Fender**, 674 P.2d 946 (Colo. 1984) (adopting and applying wrong-of-another doctrine); **Publix Cab Co. v. Colorado National Bank**, 139 Colo. 205, 338 P.2d 702 (1959) (recognizing the wrong-of-another doctrine in principle); **Sun Indemnity Co. v. Landis**, 119 Colo. 191, 201 P.2d 602 (1948) (same); **International State Bank v. Trinidad Bean & Elevator Co.**, 79 Colo. 286, 245 P. 489 (1926); **Stevens v. Moore & Co. Realtor**, 874 P.2d 495 (Colo. App. 1994) (wrongful act need not be

the sole cause of the prior litigation in order to recover wrongful damages due to wrong of another); and **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (Colo. App. 1975).

# **CHAPTER 6. DAMAGES FOR INJURIES TO PERSONS OR PROPERTY**

## **Introductory Note**

### **A. PERSONAL INJURIES**

- 6:1 Personal Injuries—Adults**
- 6:1A Special Interrogatories to the Jury to Determine the Amount of Damages Awarded for Economic and Noneconomic Losses or Injuries and for Physical Impairment or Disfigurement—Mechanics for Submitting**
- 6:1B Answers to Special Interrogatories to the Jury Set Forth in Instruction 6:1A**
- 6:2 Personal Injuries—Minor Child**
- 6:3 Personal Injuries—Minor Child—Measure of Parents' Damages**
- 6:4 Personal Injuries—Minor Child—Loss of Earnings—Distinction Between Parents' and Child's Claims**
- 6:5 Loss of Consortium—Elements of Liability**
- 6:6 Loss of Consortium—Defined—Damages**
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- 6:8 Aggravation of Preexisting Condition**
- 6:9 Damages Caused by Unrelated Second Event**
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### **B. DAMAGES FOR LOSS OR DESTRUCTION OF PERSONAL PROPERTY**

- 6:11 Personal Property—Difference in Market Value**
- 6:12 Personal Property—Cost of Repairs**
- 6:13 Personal Property—Loss of Use**

### **C. MULTIPLE RECOVERY**

- 6:14 Multiple Recovery Prohibited (When Plaintiff Suing on Alternative but Duplicative Claims for Relief)**



## **Introductory Note**

### **Measure of Damages**

1. The instructions in Part A of this chapter are intended for use primarily in negligence cases in which the limitations on damages for “noneconomic loss or injury” set forth in section 13-21-102.5, C.R.S., apply. For other tort claims, special damage instructions have been prepared that also apply to cases where the statutory limitations on noneconomic losses or injuries apply. For these other damage instructions, see the Detailed Table of Contents to this publication.

2. Part B of this chapter contains instructions on the proper measure of damages for the loss or destruction of personal property. For the proper measure of damages in cases involving physical damage to real property, see Instruction 18:4. See also the Source and Authority to Instruction 18:4 for the proper measure of damages for (1) the destruction of improvements to real property, (2) damages to crops, (3) damages to trees and timber, and (4) the appropriation of gravel, ore, coal, oil, or other minerals.

3. Instructions on the proper measure of damages in actions for breach of contract are set forth in Part E of Chapter 30. Also, for damages for wrongful discharge from employment, see Instructions 31:7 (breach of contract) and 31:15 (tort).

### **Comparative Negligence and Pro Rata Liability**

4. In negligence cases in which either the comparative negligence statute, § 13-21-111, C.R.S., or the pro rata liability statute, § 13-21-111.5, C.R.S., or both, apply, the Instructions and special verdict forms in Part C of Chapter 9 should be used in conjunction with Instruction 6:1, but not with the special verdict forms in Instructions 6:1A and 6:1B in Part A of this Chapter. In negligence cases in which neither the comparative negligence statute, § 13-21-111, nor the pro rata liability statute, § 13-21-111.5, applies, the Instructions in Chapter 9 should be used in conjunction with Instructions 6:1, 6:1A, and 6:1B.

5. As an alternative in such cases, Instruction 4:20, the model unified verdict form, may be used in conjunction with Instruction 6:1, 6:1A, and 6:1B instead of the special verdict forms in Part C of Chapter 9. Instructions 6:1, 6:1A, and 6:1B should also be used in conjunction with product liability claims in which neither the comparative negligence statute, § 13-21-111, nor the pro rata liability statute, § 13-21-111.5, applies.

### **Comparative Fault and Pro Rata Liability**

6. In product liability cases in which either the comparative fault statute, § 13-21-406, C.R.S., or the pro rata liability statute, § 13-21-111.5, or both, apply, the instructions and special verdict forms in Part E of Chapter 14 should be used in conjunction with Instructions 6:1, 6:1A, and 6:1B in Part A of this chapter.

7. Again, as an alternative, Instruction 4:20, the model unified verdict form, may be used instead of the special verdict forms in Part E of Chapter 14.

### **Pro Rata Liability in Other Tort Actions**

8. In other tort actions resulting in death or injury to persons or property in which the pro rata liability statute applies, Instruction 4:20, the model unified verdict form, should be used in conjunction with the applicable special damage instruction for the specific kind of tortious conduct on which the claim is based rather than Instructions 6:1, 6:1A, and 6:1B.

### **Tort Actions Against Health Professionals**

9. In tort actions against health care professionals or institutions subject to the limitations on damages provided by sections 13-21-102.5, 13-64-203 to -205, and 13-64-302, C.R.S., the instructions in subpart D of Part I of Chapter 15 should be used rather than Instructions 6:1, 6:1A, and 6:1B.

### **Wrongful Death**

10. In actions for wrongful death, Instructions 10:3 and 10:4 should be used rather than Instructions 6:1, 6:1A, and 6:1B.

### **Economic Loss Rule**

11. For a discussion of the economic loss rule, see the Introductory Note to Chapter 9.

**A. PERSONAL INJURIES****6:1 PERSONAL INJURIES—ADULTS**

**Plaintiff, (name), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the (insert appropriate description, e.g., "negligence") of the defendant(s), (name[s]), (and) (,) (the [insert appropriate description, e.g., "negligence"], if any, of the plaintiff[s], [name(s)]), (and) (the [insert appropriate description, e.g., "negligence"], if any, of any designated nonparties).**

**In determining such damages, you shall consider the following:**

**1. Any noneconomic losses or injuries which plaintiff has had to the present time or probably will have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and (insert any other recoverable noneconomic losses for which there is sufficient evidence). (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be included in a separate category.)**

**2. Any economic losses or injuries which plaintiff has had to the present time or probably will have in the future, including: loss of earnings or damage to (his) (her) ability to earn money in the future, (reasonable and necessary) medical, hospital, and other expenses, and (insert any other recoverable economic losses of which there is sufficient evidence). (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be included in a separate category.)**

**(3. Any [physical impairment] [or]**



[disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined under either numbered paragraph 1 or 2 above.)

#### Notes on Use

1. See the Introductory Note to this Chapter.
2. Use only those numbered paragraphs or parenthesized portions of the instruction that apply to the evidence in the case.
3. This instruction, together with Instructions 6:1A and 6:1B, where applicable, can also be used in lieu of other, more specific, instructions on damages by deleting or adding such elements of damage as are appropriate in light of the evidence in the case.
4. The amount of damages prayed for should not be stated in this instruction or in the statement of the case. **Rodrigue v. Hausman**, 33 Colo. App. 305, 519 P.2d 1216 (1974); see Note 2 of the Notes on Use to Instruction 2:1; see also C.R.C.P. 8(a) (no dollar amount shall be stated in the demand or prayer for relief).
5. If the jury has found in favor of the plaintiff, then they have found that the defendant was negligent. Therefore, the phrase “if any” in the first paragraph is not necessary after “the negligence of the defendant(s)” but is necessary after the reference to the possible negligence of plaintiff and any nonparty.
6. Because the nature of the tortious conduct of the parties or designated nonparties need not be the same, the final clause of the first paragraph of this instruction must be tailored by including a description of the culpable conduct alleged against each party and designated nonparty. See, e.g., **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). Additionally, where there are multiple defendants, and different types of tortious conduct have been alleged against different defendants (for example, negligence as against Defendant A and strict liability or “fault” as against Defendant B), the final clause of the first paragraph of this instruction must be altered to describe separately the nature of the tortious conduct alleged as to each defendant.
7. For civil actions other than medical malpractice actions, the maximum amount of noneconomic and derivative noneconomic damages that may be awarded is set by section 13-21-102.5(3)(a) and (b), C.R.S., as adjusted periodically for inflation by the Colorado secretary of state. § 13-21-102.5(3)(c). As of the most recent certification of January 14, 2020, the secretary of state has certified the following adjusted limitations for these damages:



For claims that accrue on or after January 1, 1998, and before January 1, 2008, \$366,250, which may be increased by the court upon clear and convincing evidence of justification to a maximum of \$732,500.

For claims that accrue on and after January 1, 2008, and before January 1, 2020, \$468,010, which may be increased by the court upon clear and convincing evidence of justification to a maximum of \$936,030.

For claims that accrue on and after January 1, 2020, \$613,760, which may be increased by the court upon clear and convincing evidence to a maximum of \$1,227,530.

For the most current information on these caps, see the secretary of state's website, [www.sos.state.co.us](http://www.sos.state.co.us).

8. "Noneconomic loss or injury" is defined as nonpecuniary harm including pain and suffering, inconvenience, emotional stress, and impairment of the quality of life. § 13-21-102.5(2)(b). "Derivative noneconomic loss or injury" is defined as "harm or emotional stress to persons other than the person suffering the direct or primary loss or injury." § 13-21-102.5(2)(a). However, nothing in section 13-21-102.5 is to be construed "to limit the recovery of compensatory damages for physical impairment or disfigurement. . . ." § 13-21-102.5(5).

9. The terms "physical impairment" and "disfigurement" are not expressly defined in section 13-21-102.5 or in any appellate decision. *But see Pringle v. Valdez*, 171 P.3d 624, 631 (Colo. 2007) ("If someone tortiously inflicts a permanent injury on another he or she has taken away something valuable which is independent and different from other recognized elements of damages such as pain and suffering and loss of earning capacity." (quoting 2 Marilyn Minzer et al., *Damages in Tort Actions* § 12.02 (1992))); *Preston v. Dupont*, 35 P.3d 433, 441 (Colo. 2001) ("Recovery for [physical impairment] at common law thus flowed from the general principle that whoever unlawfully injures another shall make her whole.").

10. The limitations of section 13-21-102.5 are not to be disclosed to the jury, but are to be imposed by the court before judgment. § 13-21-102.5(4). To enable the court to do so, however, requires that the jury be instructed separately as to "economic" and "noneconomic" loss or injury as well as "physical impairment" or "disfigurement." *See, e.g., Cooley v. Paraho Dev. Corp.*, 851 P.2d 207 (Colo. App. 1992), *aff'd on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); *Herrera v. Gene's Towing*, 827 P.2d 619 (Colo. App. 1992); *Hoffman v. Schafer*, 815 P.2d 971 (Colo. App. 1991), *aff'd on other grounds*, 831 P.2d 897 (Colo. 1992).

11. Before applying the limitations on damages set forth in section

13-21-102.5(3)(a) to an award of damages for noneconomic losses, the court first must apportion liability based upon the relative degree of negligence among the joint tortfeasors pursuant to section 13-21-111.5, C.R.S. *See General Elec. Co.*, 866 P.2d at 1367-68; *see also Alhilo v. Kliem*, 2016 COA 142, ¶ 66, 412 P.3d 902 (under the Wrongful Death Act, §§ 13-21-201 to -204, C.R.S., court apportions fault before applying the damage cap to the amount awarded). The limitation amount applies to each party that recovers damages individually and not to all the recovering parties in the aggregate. *Palmer v. Diaz*, 214 P.3d 546 (Colo. App. 2009).

12. Also, in cases involving more than one defendant, the \$250,000 cap on noneconomic damages in section 13-21-102.5(3)(a) applies to the amount of noneconomic damages that a plaintiff can recover from each defendant, rather than to the total amount of noneconomic damages awarded. *General Elec. Co.*, 866 P.2d at 1366; *see also Colo. Permanente Med. Grp., P.C. v. Evans*, 926 P.2d 1218 (Colo. 1996) (distinguishing the \$250,000 cap on noneconomic damages set forth in the medical malpractice damages statute, § 13-64-302, C.R.S., from the damage cap on noneconomic damages set forth in section 13-21-102.5(3)(a)).

13. Under section 13-21-111.5, the damages awarded against the nonsettling defendants should be reduced only by an amount equivalent to the percentage of liability attributed to the settling nonparties irrespective of the settlement amounts actually paid to the plaintiff. *Smith v. Zufelt*, 880 P.2d 1178 (Colo. 1994); *accord Sprung v. Adcock*, 903 P.2d 1224 (Colo. App. 1995).

14. In cases where the jury returns a verdict against a defendant based solely on a principle of vicarious liability for the conduct of another party, such as respondeat superior, a monetary settlement with the party whose conduct led to the defendant's vicarious liability must be set off against the sum of the verdict plus statutory prejudgment interest as of the time of the settlement. *Marso v. Homeowners Realty, Inc.*, 2018 COA 15M, ¶¶ 1-2, 14-45, 418 P.3d 542.

15. Other damages limitations include section 13-64-302, for tort actions against health care professionals or institutions, *see* Instruction 15:14 and the related instructions in Part I, subpart D of Chapter 15, and sections 13-21-203 and 203.5, C.R.S., for wrongful death actions, *see* Instruction 10:3.

16. In addition to the general limitations on recoverable damages set out in section 13-21-102.5, other statutes impose limitations on recoverable damages in certain specific cases. When any such statute may apply, other instructions should be used or appropriate modifications must be made in this instruction. *See, e.g.*, § 13-64-302 (actions against health care professionals and institutions); §§ 24-10-114 & 118(1)(d), C.R.S. (public entities and public employees in actions brought under



the Colorado Governmental Immunity Act); § 33-41-103(2)(a), C.R.S. (liability of landowner who makes land available to public entity for recreational purposes); § 33-44-113, C.R.S. (liability of ski area operators to various users); *see also* **Pyles-Knutzen v. Bd. of Cty. Comm'rs**, 781 P.2d 164 (Colo. App. 1989) (claim under Colorado Governmental Immunity Act is limited by section 24-10-114(1), but not by amount "requested" by plaintiff in notice of claim submitted under section 24-10-109(2)(e), C.R.S.).

17. The potentially competing claims of an injured party and a subrogated insurance carrier are subject to the provisions of section 10-1-135, C.R.S.

18. Omit any element of damage for which there is insufficient evidence. **Barter Mach. & Supply Co. v. Muchow**, 169 Colo. 100, 453 P.2d 804 (1969); **Stahl v. Cooper**, 117 Colo. 468, 190 P.2d 891 (1948). For example, "[a]n instruction on permanent injuries or future pain and suffering should not be given unless there is evidence from which it can be inferred with reasonable probability that such permanent injuries have been sustained or that such future pain and suffering will occur." **Sours v. Goodrich**, 674 P.2d 995, 996 (Colo. App. 1983). On the other hand, "if there is evidence of permanent disability, a court may instruct the jury on impairment of future earning capacity." **Phillips v. Monarch Recreation Corp.**, 668 P.2d 982, 987 (Colo. App. 1983). And the jury must compensate an injured party for proven damages. **Villandry v. Gregerson**, 824 P.2d 829 (Colo. App. 1991), *overruled on other grounds by* **Lee's Mobile Wash v. Campbell**, 853 P.2d 1140 (Colo. 1993); *see also* **Peterson v. Tadolini**, 97 P.3d 359 (Colo. App. 2004) (noneconomic damages award of zero was inconsistent with undisputed evidence of plaintiff's pain and loss of enjoyment of life, necessitating new trial on issue of damages).

### Source and Authority

1. The first paragraph of this instruction is supported by **Pullman Palace Car Co. v. Barker**, 4 Colo. 344 (1878). The remaining numbered paragraphs are based on section 13-21-102.5.

### Constitutionality of cap on noneconomic damages

2. The constitutionality of the damages cap on noneconomic damages, *see* § 13-21-102.5(3), was upheld in **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997). **Accord Stewart v. Rice**, 25 P.3d 1233 (Colo. App. 2000), *rev'd on other grounds*, 47 P.3d 316 (Colo. 2002).

### Recoverable Damages

3. Generally, as to the various elements of damages that may be recoverable, *see* **Thompson v. Tartler**, 166 Colo. 247, 443 P.2d 365 (1968) (loss of future earnings); **Van Schaack & Co. v. Perkins**, 129 Colo. 567, 272 P.2d 269 (1954); **Gerick v. Brock**, 120 Colo. 394, 210 P.2d 214

(1949); **Colo. Utils. Corp. v. Casady**, 89 Colo. 156, 300 P. 601 (1931); **Denver Tramway Corp. v. Gentry**, 82 Colo. 51, 256 P. 1088 (1927); **Russo v. Birrenkott**, 770 P.2d 1335 (Colo. App. 1988); **Short v. Downs**, 36 Colo. App. 109, 537 P.2d 754 (1975) (permanent injuries); and **Brncic v. Metz**, 28 Colo. App. 204, 471 P.2d 618 (1970). *See also* Colorado's Construction Defect Action Reform Act, §§ 13-20-801 to -808, C.R.S. (describing recoverable damages in construction defect claims).

4. Damages for "loss of future earning capacity" are compensable even though they may be "uncertain in respect to the amount." **Brittis v. Freeman**, 34 Colo. App. 348, 354, 527 P.2d 1175, 1179 (1974); *see also* **Martinez v. Shapland**, 833 P.2d 837 (Colo. App. 1992); **Kitto v. Gilbert**, 39 Colo. App. 374, 570 P.2d 544 (1977). A plaintiff's immigration status may be relevant to a determination of future wage loss in some circumstances. **Silva v. Wilcox**, 223 P.3d 127 (Colo. App. 2009). Also, if there is evidence of permanent injury, to be awarded damages for loss of future earnings, a plaintiff need not show that but for the injury he or she could have earned more money. **Jones v. Cruzan**, 33 P.3d 1262 (Colo. App. 2001) (evidence that plaintiff was earning more money after the injury did not preclude an award of damages for diminished earning capacity where there was evidence of permanent injury).

5. Medical expenses are compensable to the extent they are reasonable in amount as well as necessary. **Kendall v. Hargrave**, 142 Colo. 120, 349 P.2d 993 (1960); **Oliver v. Weaver**, 72 Colo. 540, 212 P. 978 (1923); **Denver City Tramway Co. v. Hills**, 50 Colo. 328, 116 P. 125 (1911). *But see* **Wal-Mart Stores, Inc. v. Crossgrove**, 2012 CO 31, ¶ 18, 276 P.3d 562 (common law portion of the collateral source rule, which applies pre-verdict, required exclusion of evidence of amount paid by medical insurer, even when offered solely to prove reasonable value of medical services). As to when gratuitously rendered medical services or medical expenses paid by others are "incurred," and hence compensable, *see* **City of Englewood v. Bryant**, 100 Colo. 552, 68 P.2d 913 (1937); and **Gomez v. Black**, 32 Colo. App. 332, 511 P.2d 531 (1973). *But see* **Smith v. Kinningham**, 2013 COA 103, ¶ 19, 328 P.3d 258 ("gratuitous government benefits" exception to collateral source rule set forth in **City of Englewood** and **Gomez** was abrogated by section 10-1-135(10)(a)).

6. While lost wages or income prior to trial, "loss of enjoyment of life," etc., have been recognized as compensable, **Hildyard v. Western Fasteners, Inc.**, 33 Colo. App. 396, 522 P.2d 596 (1974), "loss of business profits" as a separate element of damages has not. **Ford Motor Co. v. Conrardy**, 29 Colo. App. 577, 488 P.2d 219 (1971).

7. In medical malpractice cases, damages for emotional distress based on a reasonable fear of an increased risk of cancer are recoverable where plaintiff demonstrates that his or her condition physically worsened as a result of the alleged malpractice. **Boryla v. Pash**, 960 P.2d 123 (Colo. 1998); *see also* **Salazar v. Am. Sterilizer Co.**, 5 P.3d 357 (Colo. App. 2000).



8. Under Colorado's survival statute, § 13-20-101(1), C.R.S., neither punitive damages nor other penalties can be awarded against a defendant who has died. **Guar. Tr. Life Ins. Co. v. Casper**, 2018 CO 43, ¶¶ 9–10, 418 P.3d 1163. Where a deceased plaintiff's claim is based upon personal injury, any damages awarded are limited to loss of earnings and expenses before death and cannot include pain, suffering, disfigurement, or prospective profits or earnings after death. § 13-20-101(1). For purposes of the survival statute, a claim for violation of section 10-3-1116 (unreasonable delay or denial of first-party insurance benefits) is not a "tort action based upon personal injury." **Casper**, ¶¶ 14–17. For instructions on claims for breach of sections 10-3-1115 and -1116, see Instructions 25:4 through 25:6.

9. For the damages one may recover against a defendant who made illegal drugs available to an illegal user and the use of such drugs caused damages to others, see Drug Dealer Liability Act, §§ 13-21-801 to -13, C.R.S. Such damages may include punitive damages, reasonable attorney fees, and costs of suit. As to the persons who may recover such damages, see section 13-21-804(1), and as to the persons who may be held liable for such damages, see section 13-21-804(2)(a) and (b).

10. For a discussion of the admissibility of expert testimony based on the "willingness-to-pay" approach to determining damages for loss of enjoyment of life, sometimes referred to as hedonic damages, see **Scharrel**, 949 P.2d at 92.

### Whether Expert Testimony Is Required

11. Expert medical testimony is not necessarily required to establish that a plaintiff suffered a permanent injury. **Lawson v. Safeway, Inc.**, 878 P.2d 127 (Colo. App. 1994).

### Interest

12. Under section 13-21-101(1), C.R.S., in a personal injury action based on tort, a plaintiff may recover interest on his or her personal injury damages from the date the action accrued, rather than from the date of filing suit. **Briggs v. Cornwell**, 676 P.2d 1252 (Colo. App. 1983). In a property damage case where damages are measured by repair and/or replacement costs, prejudgment interest accrues from the date the costs were incurred, not the date of the original damage. **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008). Prejudgment interest, as an element of damage, is to be determined by the court. § 13-21-101(1). The trial court is to calculate interest on the amount of the reduced award, after application of any statutory damages caps, regardless of the amount awarded by the jury. **Morris v. Goodwin**, 185 P.3d 777 (Colo. 2008) (analyzing interest and damages cap of section 13-64-302). Where a settlement with an agent is to be set off against a verdict against the principal based on respondeat superior, however, prejudgment interest is to be calculated on the verdict first, before applying the setoff. **Marso**, 2018 COA 15M, ¶¶ 2, 35–45.

### Collateral Source Rule

13. Section 13-21-111.6, C.R.S., directs the court, in any action “for a tort resulting in death or injury to person or property,” to reduce the amount of damages awarded, before entering judgment, by the amount of certain collateral benefits received by the plaintiff, but not including collateral benefits paid, “as a result of a contract entered into and paid for by or on behalf of such [injured] person.” *See, e.g., Keelan v. Van Waters & Rogers, Inc.*, 820 P.2d 1145 (Colo. App. 1991) (personal injury award obtained by Denver firefighter could not be reduced by amount of disability benefits received by firefighter through statewide fund created pursuant to statute because disability benefits were paid as a result of firefighter’s employment contract with the City of Denver), *aff’d*, 840 P.2d 1070 (Colo. 1992); *see also Crossgrove*, 2012 CO 31, ¶ 18 (common law portion of the collateral source rule, which applies pre-verdict, required exclusion of evidence of amount paid by medical insurer for plaintiff’s medical expenses, even where offered solely to prove reasonable value of medical services, and collateral source statute applies only post-verdict); *Smith v. Jeppsen*, 2012 CO 32, ¶¶ 20-22, 277 P.3d 224 (companion case to *Crossgrove*); *Sunahara v. State Farm Mut. Auto. Ins. Co.*, 2012 CO 30M, ¶¶ 13-19, 280 P.3d 649 (companion case to *Crossgrove*); *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010) (contract clause of statutory collateral source rule, § 13-21-111.6, applies where plaintiff’s medical insurer paid discounted amounts to medical providers, and, under the common-law collateral source rule, plaintiff’s damages are not reduced by the amount of the discount); *Colo. Permanente Med. Grp.*, 926 P.2d at 1230; *Forfar v. Wal-Mart Stores, Inc.*, 2018 COA 125, ¶ 31, 436 P.3d 580 (plaintiff’s damages are not reduced in post-verdict proceedings by the amount of Medicare benefits received because such benefits fall within the contract exception in section 13-21-111.6); *Pressey v. Children’s Hosp. Colo.*, 2017 COA 28, ¶ 14 (plaintiff’s damages are not reduced in post-verdict proceedings by the amount of Medicaid benefits received because such benefits fall within the contract exception in section 13-21-111.6); *Dep’t of Human Servs. v. State Personnel Bd.*, 2016 COA 37, ¶¶ 31-42, 371 P.3d 748 (PERA disability benefits constitute a collateral source and are not to be offset against a damage award.); *Calderon v. Am. Family Mut. Ins. Co.*, 2014 COA 70, ¶¶ 28-32, 409 P.3d 393 (post-verdict setoff rule codified in section 13-21-111.6 does not bar insurer from setting off Medpay benefit against judgment against insurer for UM/UIM benefits because the defendant is the collateral source), *rev’d on other grounds*, 2016 CO 72, 383 P.3d 676; *Stresscon Corp. v. Travelers Prop. Cas. Co. of Am.*, 2013 COA 131, ¶¶ 80-86, 373 P.3d 615 (contract clause of statutory collateral source rule normally would apply to plaintiff’s receipt of insurance proceeds paid by sub-contractor’s insurer, but plaintiff contracted this right away by means of the “other insurance” clause in applicable insurance policies), *rev’d on other grounds*, 2016 CO 22M, 370 P.3d 140; *Miller v. Brannon*, 207 P.3d 923 (Colo. App. 2009) (PIP benefits received by plaintiff within contract exception to collateral source rule); *Combined Commc’ns Corp. v. Pub. Serv. Co.*, 865 P.2d 893 (Colo. App. 1993). Where an insured obtains a judgment against an insurer for first-party



benefits, however, the contract clause of section 13-21-111.6 does not preclude the insurer from exercising a contractual right to reduce the judgment by the amount the insurer previously paid for the insured's medical expenses. **Levy v. Am. Family Mut. Ins. Co.**, 293 P.3d 40 (Colo. App. 2011). Under section 10-1-135(10)(a), the fact or amount of any collateral source payments is expressly inadmissible in actions against third-party tortfeasors or to recover uninsured motorist benefits under section 10-4-609, C.R.S. **Smith**, 2013 COA 103, ¶ 19 (Medicaid payments are inadmissible collateral source benefits and the "gratuitous government benefits" exception set forth in **City of Englewood**, 100 Colo. at 554, 68 P.2d at 915, and **Gomez**, 32 Colo. App. at 336, 511 P.2d at 533, was overruled by section 10-1-135(10)(a)).

14. The collateral source rule does not apply to an employee's claim for past medical expenses where the employer's workers' compensation insurer has settled its subrogation claim for reimbursement of those expenses, because such a settlement completely extinguishes the employee's claim for such expenses. **Delta Airlines v. Scholle**, 2021 CO 20, ¶¶ 1, 21-22, 484 P.3d 695.

15. For a discussion of the relationship between the collateral source rule set forth in section 13-21-111.6, and the Uniform Contribution Among Tortfeasors Act, §§ 13-50.5-101 to -106, C.R.S., see **Smith**, 880 P.2d at 1188 (section 13-50.5-105 applies to settlement agreements entered into to avoid liability at trial, rather than the damage reduction provisions of the "collateral source rule" set forth in section 13-21-111.6).

### **Federal Law**

16. In FELA actions tried in state courts, the proper measure of damages is to be determined as a matter of federal law. **Monessen Sw. Ry. v. Morgan**, 486 U.S. 330 (1988) (as matter of federal law, plaintiff was not entitled to prejudgment interest, and damages for lost future earnings must be discounted to present value). For a discussion of various formulas for calculating a discount to present value, see **Brady v. Burlington Northern Railroad**, 752 P.2d 592 (Colo. App. 1988). See also **Failing v. Burlington N. R.R.**, 815 P.2d 974 (Colo. App. 1991).

17. Other limitations on the recovery of damages may apply when recovery is sought against a volunteer of a nonprofit organization or governmental entity "for harm caused by an act or omission of the volunteer on behalf of the organization or entity." 42 U.S.C. § 14503(a) (2018). For the applicable limitations, see Volunteer Protection Act of 1997, 42 U.S.C. §§ 14503 and 14504. When applicable, this and related instructions on damages must be modified as appropriate. 42 U.S.C. §§ 14501-05.

**6:1A SPECIAL INTERROGATORIES TO THE JURY  
TO DETERMINE THE AMOUNT OF  
DAMAGES AWARDED FOR ECONOMIC  
AND NONECONOMIC LOSSES OR  
INJURIES AND FOR PHYSICAL  
IMPAIRMENT OR DISFIGUREMENT—  
MECHANICS FOR SUBMITTING**

The following questions relate to the amount of damages, if any, which you may determine the plaintiff is entitled to recover from (the defendant) (one or more of the defendants) on plaintiff's claim of (*insert appropriate description of claim, e.g., "negligence," "battery," etc.*).

If you find that the plaintiff is not entitled to recover any (actual) damages from (the defendant) (one or more of the defendants), then you should not answer any of the following questions and you should not fill in any part of the accompanying form titled "Answers to Questions Regarding Damages."

On the other hand, if you find that the plaintiff is entitled to recover damages from (the defendant) (one or more of the defendants), then you must answer all of the following questions and your foreperson must put your answers on the form titled "Answers to Questions Regarding Damages."

In answering these questions you should include all of the plaintiff's damages which you find were caused, in whole or in part, by the (*insert appropriate description, e.g., negligence, fault, conduct, etc.*) of (the defendant) (one or more of the defendants).

You must all agree on your answers to each of the questions. After your foreperson has put your answers to all of the questions on the accompanying answer form, you must all sign the completed form on the signature lines provided at the end of the form.

1. What is the total amount of plaintiff's dam-



ages, if any, for noneconomic losses or injuries, (excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable instruction on damages*). You should answer “0” if you determine there were none.

2. What is the total amount of plaintiff’s damages, if any, for economic losses, (excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable instruction on damages*). You should answer “0” if you determine there were none.

(3. What is the total amount of plaintiff’s damages for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)

#### Notes on Use

1. This instruction should be used in actions in which the limitations on damages for “noneconomic loss or injury” set forth in section 13-21-102.5, C.R.S., may apply.

2. Instruction 6:1B should be given whenever this instruction is given.

3. The Notes on Use to Instruction 6:1 also apply to this instruction.

4. The parenthesized language in the first sentences of numbered paragraphs 1 and 2 and the parenthesized numbered paragraph 3 of this instruction should be given only if there is sufficient evidence to support a finding that physical impairment or disfigurement has been sustained.

5. In cases involving (1) comparative negligence (see Instructions 9:22 through 9:27D), (2) the negligence or fault of a nonparty (see Instructions 9:28 through 9:29B), or (3) comparative fault (see Instructions 14:30 through 14:33B), this instruction and Instruction 6:1B should not be used.

6. In cases involving multiple claims for both economic and noneconomic damages, if the damages for each such claim are identical,

then this instruction should be appropriately modified so that only one set of the special interrogatories set forth in this instruction is submitted to the jury for all such claims. In such cases, Instruction 6:14 must be given with this instruction. On the other hand, if the economic and noneconomic damages for such claims are not identical, then a separate set of the special interrogatories set forth in this instruction must be submitted for each such claim.

7. When this instruction is given with instructions on damages other than Instruction 6:1 (such as 6:2 and 6:3), such other instructions on damages may need to be modified to differentiate the noneconomic damages and the economic damages. When making any such modifications, Instruction 6:1 may be used as a model.

### Source and Authority

See the Source and Authority to Instruction 6:1.

**6:1B ANSWERS TO SPECIAL INTERROGATORIES  
TO THE JURY SET FORTH IN  
INSTRUCTION 6:1A**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	<b>ANSWERS TO</b>
	)	<b>QUESTIONS</b>
<b>v.</b>	)	<b>REGARDING</b>
	)	<b>DAMAGES</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER ANY OF THESE QUESTIONS  
IF YOU HAVE RETURNED A VERDICT IN FAVOR OF  
(THE DEFENDANT) (ALL OF THE DEFENDANTS)  
AND AGAINST THE PLAINTIFF**

**We, the jury, present our Answers to the Questions submitted by the Court, to which we have all agreed:**

**1. What is the total amount of plaintiff's damages for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable instruction on damages*). You should answer "0" if you determine there were none.**

**ANSWER: \$ \_\_\_\_\_**

**2. What is the total amount of plaintiff's damages for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruc-**

**tion** (insert number of the applicable instruction on damages). You should answer “0” if you determine there were none.

**ANSWER: \$\_\_\_\_\_**

**3. What is the total amount of plaintiff’s damages for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.**

**ANSWER: \$\_\_\_\_\_**

	<b>Foreperson</b>

### Notes on Use

See Notes on Use to Instructions 6:1 and 6:1A.

### Source and Authority

See Source and Authority to Instruction 6:1.



## 6:2 PERSONAL INJURIES—MINOR CHILD

**Plaintiff, (name), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages. If you find in favor of the plaintiff, you must determine the total dollar amount of plaintiff's damages, if any, that were caused by the (insert appropriate description, e.g., "negligence") of the defendant(s), (name[s]), (and) (,) (the [insert appropriate description, e.g., "negligence"], if any, of the plaintiff(s), [name(s)]), (and) (the [insert appropriate description, e.g., "negligence"], if any, of any designated nonparties).**

**In determining such damages, you shall consider the following:**

**1. Any noneconomic losses or injuries which plaintiff has had to the present time or probably will have in the future, including: physical and mental pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and (insert any other recoverable noneconomic losses for which there is sufficient evidence). (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], because these damages, if any, are to be included in a separate category.)**

**2. Any (reasonable and necessary) medical, hospital, and similar expenses which plaintiff has had or probably will have in the future;**

**3. Any other economic losses or injuries which plaintiff will probably have in the future after (he) (she) reaches the age of 18 (or is otherwise emancipated), including: loss or damage to (his) (her) ability to earn money in the future, and (insert any other recoverable economic losses of which there is sufficient evidence). (In considering damages in this category, you shall not include actual damages for [physical impairment] [or] [disfigurement], since these damages, if any, are to be included in a separate category.)**

(4. Any [physical impairment] [or] [disfigurement]. In considering damages in this category, you shall not include damages again for losses or injuries already determined under numbered paragraphs 1, 2, or 3 above.)

(In determining the plaintiff's, *(name of minor child)*, damages you should not include [any future expenses for *(insert appropriate description of non-medical expenses)*] [or] [any future (loss of earnings) (impairment of earning capacity)] which plaintiff *(name of minor child)* may have between now and the time when (he) (she) reaches the age of 18 [or is emancipated] because these damages, if any, are recoverable by the plaintiff's parents.) (For the same reason, you should not include in plaintiff's, *(name of minor child)*, damages any damages for any loss of past earnings.)

#### Notes on Use

1. The Notes on Use to Instruction 6:1 also apply to this instruction.
2. Omit any parenthesized or bracketed words or phrases which are inappropriate to the particular case. The last paragraph in particular should be omitted if there is no claim for damages relating to earnings or to non-medical expenses. If either or both of these matters are involved, such portions of this paragraph should be used as are appropriate.
3. If one or both parents have joined with the minor as plaintiffs to recover their damages, Instruction 6:3 also should be given with this instruction.
4. When necessary, Instruction 7:1, defining "minor child," and Instruction 7:2, defining "emancipation," should be given with this instruction.
5. For a discussion of the propriety of submitting to the jury the issue of post-majority lost future earning capacity or lost wages under a general damage instruction without any evidence as to the amount or measure of these damages, see *Stewart v. Rice*, 25 P.3d 1233 (Colo. App. 2000), *rev'd on other grounds*, 47 P.3d 316 (Colo. 2002).

#### Source and Authority

1. This instruction is supported by section 13-21-102.5, C.R.S.

2. As to the age at which a child ceases to be a minor, see sections 2-4-401(6) and 13-22-101, C.R.S.

3. In *Rudnicki v. Bianco*, 2021 CO 80, ¶¶ 44–45, the Colorado Supreme Court overruled prior precedent and held that an unemancipated minor child could recover damages for pre-majority medical expenses. Parents of the child also may recover such expenses, provided that no double recovery is permitted.

4. “An injury to a minor creates separate causes of action: (1) the parents generally may recover for the child’s damages suffered and expenses of the child during minority; (2) the minor may recover expenses the minor actually incurs during minority and for pain and suffering and post-majority impairment of future earning capacity; and (3) an emancipated minor has the right to sue for all damages and expenses.” **Pressey v. Children’s Hosp. Colo.**, 2017 COA 28, ¶ 26 (overruled as to pre-majority medical expenses by *Rudnicki, supra*); see also **Nat’l Fuel Co. v. Green**, 50 Colo. 307, 115 P. 709 (1911).

5. As to the minor’s right to recover for pain and suffering, see **Colorado Utilities Corp. v. Casady**, 89 Colo. 156, 300 P. 601 (1931).

6. The parent is entitled to recover for loss of the minor’s earnings during the child’s minority unless the child has been emancipated, **Pawnee Farmers’ Elevator Co. v. Powell**, 76 Colo. 1, 227 P. 836 (1924), or, unless the parent has allowed the child to retain the child’s own earnings. See **Harman v. Chase**, 160 Colo. 449, 417 P.2d 784 (1966) (by implication). The minor, however, is entitled to damages for any loss or impairment of future earning capacity if such loss is supported by sufficient evidence. **Pawnee Farmers Elevator Co.**, 76 Colo. at 7, 227 P. at 839; see also **Thompson v. Tartler**, 166 Colo. 247, 443 P.2d 365 (1968); **Odell v. Pub. Serv. Co.**, 158 Colo. 404, 407 P.2d 330 (1965).

7. A parent may relinquish the right to pre-majority expenses. **Pressey**, 2017 COA 28, ¶ 27.



### 6:3 PERSONAL INJURIES—MINOR CHILD— MEASURE OF PARENTS' DAMAGES

Plaintiff(s), (*name[s]*), (has) (have) the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) (their) damages. If you find in favor of the plaintiff(s), (*name of parent[s]*), on (his) (her) (their) claim of damages for injuries caused to (his) (her) (their) minor child, (*name of minor child*), by the defendant(s), (*name[s] of defendant[s]*), you must determine the total dollar amount of plaintiff('s)(s'), (*name[s] of parent[s]*), damages, if any, that were caused by the (*insert appropriate description, e.g., "negligence"*) of the defendant(s), (*name[s]*), (and) (,) (the [*insert appropriate description, e.g., "negligence"*], if any, of the plaintiff(s), (*name[s]*), (and) (the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).

In determining such damages, you shall consider the following:

1. Any (reasonable and necessary) expenses the plaintiff(s) (has) (have) had on (*name of minor child*)'s behalf to the present time and any expenses the plaintiff(s), (*name[s] of parent[s]*), will have in the future between now and the time (*name of minor child*) reaches the age of 18 (or is emancipated) for (*insert appropriate description, using separately lettered subparagraphs for various categories, if necessary*);

2. Any loss of past earnings (*name of minor child*) may have had to the present time;

3. Any future (loss of earnings) (damage to [*name of minor child's*] ability to earn money in the future) probably will have between now and the time when (*name of minor child*) reaches the age of 18 (or is emancipated);

4. Any loss of past household and similar services or any loss of such services in the future (*name*



*of minor child*) **would have provided to the plaintiff(s), (name[s] of parent[s]) until (name of minor child) reaches the age of 18 (or is emancipated);**

**5.** *(Insert any other appropriate elements of damages, e.g., any unusual services the plaintiff may be required to render the child because of [his] [her] injuries).*

### Notes on Use

1. The Notes on Use to Instruction 6:1 also apply to this instruction.

2. Under the Colorado Supreme Court's decision in *Rudnicki v. Bianco*, 2021 CO 80, ¶¶ 44–45, both an unemancipated minor child and the child's parents may sue to recover damages for the child's pre-majority medical expenses, provided that no double recovery is permitted.

3. When the parent only is suing on his or her own claim, Instruction 6:4 should be given with this instruction.

4. When necessary, Instruction 7:1, defining "minor child," and Instruction 7:2, defining "emancipation," should be given with this instruction.

### Source and Authority

1. See the Source and Authority to Instruction 6:2.

2. Parents may not recover damages for loss of consortium arising solely from injury to the child. **Elgin v. Bartlett**, 994 P.2d 411 (Colo. 1999).

3. "An injury to a minor creates separate causes of action: (1) the parents generally may recover for the child's damages suffered and expenses of the child during minority; (2) the minor may recover expenses the minor actually incurs during minority and for pain and suffering and post-majority impairment of future earning capacity; and (3) an emancipated minor has the right to sue for all damages and expenses." **Pressey v. Children's Hosp. Colo.**, 2017 COA 28, ¶ 26 (overruled as to pre-majority medical expenses by *Rudnicki, supra*).

4. Several Colorado cases have considered the damages a parent is entitled to recover for injuries to his or her unemancipated minor child. See **Odell v. Pub. Serv. Co.**, 158 Colo. 404, 407 P.2d 330 (1965) (hospital, medical, and additional educational expenses); **Colo. Utils. Corp. v. Casady**, 89 Colo. 168, 300 P. 606 (1931) (future pecuniary expense and loss of services); **Pawnee Farmers' Elevator Co. v. Powell**, 76 Colo. 1, 227 P. 836 (1924) (loss of earnings and diminution of earning capacity).

5. When a case involving a child's death arises under the Ski Safety Act, §§ 33-44-101 to -114, C.R.S., the damages recoverable by a parent are subject to the cap contained in section 33-44-113, C.R.S., not the cap contained in the Wrongful Death Act, § 13-21-203(1)(a), C.R.S. **Stamp v. Vail Corp.**, 172 P.3d 437 (Colo. 2007).

## **6:4 PERSONAL INJURIES—MINOR CHILD—LOSS OF EARNINGS—DISTINCTION BETWEEN PARENTS' AND CHILD'S CLAIMS**

**Earnings of a minor child before emancipation belong to the parents. Earnings after emancipation or after reaching the age of 18 belong to the child.**

### **Notes on Use**

1. When Instruction 6:2 is given, this instruction normally will not be necessary. When, however, a parent is suing only on his or her own claim, in which case Instruction 6:3 will be given, this instruction also should be given.

2. See Instruction 7:1, defining "minor," and Instruction 7:2, defining "emancipation."

### **Source and Authority**

This instruction is supported by section 13-22-101(1), C.R.S. See also Source and Authority to Instructions 6:2 & 6:3.

## 6:5 LOSS OF CONSORTIUM—ELEMENTS OF LIABILITY

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of loss of consortium for injury to the plaintiff's spouse, *(name)*, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant was negligent;
2. *(Name of spouse)* was injured as a result of the defendant's negligence;
3. The plaintiff and *(name of spouse)* were married at the time *(name of spouse)* was injured; and
4. As a result of such injuries to *(name of spouse)*, the plaintiff also had a loss of (his) (her) rights of consortium.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict on the plaintiff's, *(name)*, claim must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert description of any affirmative defenses*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.



### Notes on Use

1. Omit any numbered paragraph as to which the facts are not in dispute.

2. Instruction 6:6 should be used with this instruction for the definition of consortium and the damages that are recoverable for its loss.

3. Damages for loss of consortium also can be recovered when caused by other forms of tortious conduct against the spouse, for example, battery. In such cases this instruction should be appropriately modified.

4. Whenever this instruction is given, the appropriate instructions relating to causation also must be given. *See* Instructions 9:18-9:21.

5. Loss of consortium is a derivative claim and is subject to the same defenses available to the underlying personal injury claim. **Colo. Comp. Ins. Auth. v. Jorgensen**, 992 P.2d 1156 (Colo. 2000); **Lee v. Colo. Dep't of Health**, 718 P.2d 221 (Colo. 1986); **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011); **Terry v. Sullivan**, 58 P.3d 1098 (Colo. App. 2002); *see also* **Elgin v. Bartlett**, 994 P.2d 411 (Colo. 1999) (claims for derivative damages subject to same defenses available to underlying claims). Thus, a claim for loss of consortium arising out of an automobile accident was derivative for purposes of the now-repealed No-Fault Act, and could be maintained only if injuries to the spouse on which the claim is based satisfied one of the statutory threshold requirements for suit. **Welch v. George**, 19 P.3d 675 (Colo. 2000).

6. While the contributory negligence of the injured spouse or the spouse claiming loss of consortium is a defense to a claim for such loss, *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 125, at 937 (5th ed. 1984), it is not necessarily a complete bar under the comparative negligence statute, § 13-21-111, C.R.S. When there is sufficient evidence of contributory negligence on the part of the injured spouse or the plaintiff, the last two unnumbered paragraphs of this instruction should be changed to read as the last two unnumbered paragraphs of Instruction 9:22 (with appropriate modifications depending on whose contributory negligence is involved). The appropriate comparative negligence instructions, *see* Instructions 9:26–9:28D, again with whatever modifications may be required, must also be given. *See also* **Pioneer Constr. Co. v. Bergeron**, 170 Colo. 474, 462 P.2d 589 (1969) (contributory negligence of wife bars husband's claims for wife's medical expenses, loss of services and consortium, and expenses for care of children).

7. If no affirmative defense has been put in issue, the last two paragraphs of the instruction should be omitted.

8. This instruction should be given regardless of whether the injured

spouse has joined in the suit to recover his or her own damages. When both spouses join in the same suit, however, separate verdict forms on the respective spouses' claims should be submitted to the jury. See **Nemer v. Anderson**, 151 Colo. 411, 378 P.2d 841 (1963) (by implication).

### Source and Authority

1. For other forms of conduct giving rise to a claim of damages for loss of consortium, see 1 H. CLARK, **THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES** § 12.5 (2d ed. 1987).

2. Section 14-2-209, C.R.S., gives a wife the same right to recover for loss of consortium as a husband.

3. For defenses in general, see PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 125, at 937-39 (5th ed. 1984).

**6:6 LOSS OF CONSORTIUM—DEFINED—  
DAMAGES**

If you find for the plaintiff, *(name of injured spouse)*, then you may award damages to **(his) (her) spouse** for any loss of consortium resulting from the injury to *(name of injured spouse)*.

Plaintiff, *(name of non-injured spouse)*, has the burden of proving, by a preponderance of the evidence, the nature and extent of **(his) (her) damages**. If you find in favor of the plaintiff, *(name of non-injured spouse)*, you must determine the total amount of **(his) (her) damages**, if any, that were caused by the *(insert appropriate description, e.g., “negligence”)* of the defendant(s), *(name[s])*, **(and) (,)** *(the [insert appropriate description, e.g., “negligence”], if any, of the plaintiffs, [names]) (,)* **(and) (the [insert appropriate description, e.g., “negligence”], if any, of any designated nonparties).**

In determining such damages, you shall consider the following:

1. Any noneconomic damages in the form of loss of affection, society, companionship, and aid and comfort of the injured spouse, and

2. Economic damages for loss of household services the injured spouse would have performed and any resulting expenses which plaintiff has had or which plaintiff will have in the future, including *(insert description of those expenses which would be compensable and concerning which there is sufficient evidence for the jury reasonably to determine their existence and amount).*

**Notes on Use**

1. Use whichever parenthesized words and phrases are appropriate to the evidence in the case.

2. When the uninjured spouse has incurred expenses under numbered paragraph 2 of this instruction to replace one or more household services, and those same expenses also might come within



the language used in Instruction 6:1 or Instruction 6:1A to describe the damages being claimed by the injured spouse, an appropriate cautionary instruction intended to prevent double recovery should be given.

3. This instruction should be given whenever Instruction 6:5 is given.

4. The court should omit the first numbered paragraph of this instruction unless the court finds there is “justification” for such “derivative noneconomic” losses or injuries “by clear and convincing evidence.” § 13-21-102.5(3)(b), C.R.S.

### Source and Authority

The definition of consortium used in this instruction is supported by 1 H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 12.5 (2d ed. 1987). Under modern definitions of consortium, “companionship” includes sexual relations, W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 125 (5th ed. 1984). *See also Schell v. Navajo Freight Lines, Inc.*, 693 P.2d 382, 385 (Colo. App. 1984) (citing former instruction, now incorporated into numbered paragraphs 1 and 2 of this instruction, and noting intangible nature of “rights arising out of a marital relationship”).



## 6:7 PERSONAL INJURIES—NON-REDUCTION OF DAMAGES—“THIN SKULL” DOCTRINE

In determining the amount of plaintiff's actual damages, you cannot reduce the amount of or refuse to award any such damages because of any (*insert appropriate description, e.g., physical frailties, mental condition, illness, etc.*) of the plaintiff that may have made (him) (her) more susceptible to injury, disability, or impairment than an average or normal person.

### Notes on Use

1. This instruction should be given when the defendant seeks to avoid or limit liability for plaintiff's injuries by asserting that the injuries would not have occurred or would have been less severe if the plaintiff had been a normal or average person. See **State Farm Mut. Auto. Ins. Co. v. Peiffer**, 955 P.2d 1008 (Colo. 1998); **Schafer v. Hoffman**, 831 P.2d 897 (Colo. 1992); **Giampapa v. Am. Family Mut. Ins. Co.**, 12 P.3d 839 (Colo. App. 2000), *rev'd on other grounds*, 64 P.3d 230 (Colo. 2003); **Loza v. State Farm Mut. Auto. Ins. Co.**, 970 P.2d 478 (Colo. App. 1998); **Kildahl v. Tagge**, 942 P.2d 1283 (Colo. App. 1996). The “thin skull” doctrine is not limited to preexisting bodily conditions, but also applies if a plaintiff is predisposed or more susceptible to injury or illness than a normal person. **Schafer**, 831 P.2d at 901. Under the “thin skull” doctrine, foreseeability is not an issue in determining the extent of a plaintiff's injuries. *Id.* at 902.

2. “[A]n egg-shell instruction is appropriate where there is evidence that the plaintiff had a dormant or asymptomatic pre-existing condition. Giving an eggshell instruction is also appropriate where a pre-existing condition was symptomatic, if there is evidence that the harm resulting from the defendant's negligence is greater than it would have been in the absence of the pre-existing condition.” **McLaughlin v. BNSF Ry. Co.**, 2012 COA 92, ¶ 44, 300 P.3d 925, 937 (applying federal law in an action brought under the Federal Employers' Liability Act, the court presents an in-depth discussion of the interrelationship between an eggshell instruction and an aggravation instruction).

3. In cases involving the aggravation of a preexisting condition, consideration must be given as to whether this instruction or Instruction 6:8, or both, apply. If both instructions are given, some modification of this instruction and Instruction 6:8 may be necessary, and an instruction clarifying for the jury how both should be applied also should be given. See *id.*

### Source and Authority

This instruction is supported by **Schafer**, 831 P.2d at 900. See also

**Stephens v. Koch**, 192 Colo. 531, 533, 561 P.2d 333, 334 (1977) (“[A] defendant must take his victim as he finds him.”); *accord* **Fischer v. Moore**, 183 Colo. 392, 517 P.2d 458 (1973).

In determining the amount of damages to be awarded to a plaintiff, the jury must take the defendant as he finds him. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial.

THE DEFENDANT

The defendant is the person who is alleged to have caused the injury to the plaintiff. The jury must determine whether the defendant is the person who caused the injury. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial.

The defendant is the person who is alleged to have caused the injury to the plaintiff. The jury must determine whether the defendant is the person who caused the injury. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial.

The defendant is the person who is alleged to have caused the injury to the plaintiff. The jury must determine whether the defendant is the person who caused the injury. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial.

THE PLAINTIFF

The plaintiff is the person who is alleged to have been injured by the defendant. The jury must determine whether the plaintiff is the person who was injured. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial. The jury must not award damages on the basis of the plaintiff's physical condition at the time of the injury, but on the basis of the plaintiff's condition at the time of the trial.

**6:8 AGGRAVATION OF PREEXISTING CONDITION**

**For the plaintiff, *(name)*, to recover damages for the aggravation of a preexisting condition, you must find all of the following have been proved:**

**1. Before *(insert date)*, the plaintiff suffered from *(insert appropriate description of ailment or disability)*;**

**2. On *(insert date)*, the defendant, *(name)*, was *(insert appropriate description, e.g., "negligent")*; and**

**3. The defendant's *(insert appropriate description, e.g., "negligence")* made the plaintiff's *(insert appropriate description of ailment or disability)* worse.**

**If you find that all of these *(number)* statements have been proved by a preponderance of the evidence, it is your duty to determine, if possible, the amount of damages, if any, caused only by the *(insert appropriate description, e.g., "negligence")* of the defendant.**

**If you are able to separate the amount of damages, if any, caused by the *(insert appropriate description, e.g., "negligence")* of the defendant from the amount of damages, if any, caused by the ailment or disability which existed before *(insert date)*, then the plaintiff is entitled to recover damages caused only by the *(insert appropriate description, e.g., "negligence")* of the defendant.**

**If you are unable to separate the damages caused by the ailment or disability which existed before *(date)* and the damages caused by the *(insert appropriate description, e.g., "negligence")* of the defendant, then the defendant is legally responsible for the entire amount of damages.**

**Notes on Use**

1. This instruction applies even where the preexisting condition



was of traumatic origin for which the plaintiff previously had recovered damages. **Hylton v. Wade**, 29 Colo. App. 98, 478 P.2d 690 (1970).

2. The rules stated in this instruction do not apply to a fact situation where the plaintiff's injuries have been aggravated by a subsequent accident not proximately caused by the defendant. *See* Instruction 6:9; *see also* **Smartt v. Lamar Oil Co.**, 623 P.2d 73 (Colo. App. 1980); **Bruckman v. Pena**, 29 Colo. App. 357, 487 P.2d 566 (1971). Where a subsequent injury may have been proximately caused by the defendant's conduct, *see* Instructions 9:19 and 9:20.

3. "[W]here plaintiff shows (1) that he had a pre-existing condition and (2) that, as a proximate result of defendant's negligence, this condition was aggravated, the giving of [this instruction], in its entirety, [is] mandatory." **Brittis v. Freemon**, 34 Colo. App. 348, 353, 527 P.2d 1175, 1178 (1974); Instructing the jury based on this instruction "is proper when sufficient evidence shows that a later event or incident either (1) causes a new, unrelated injury to the plaintiff or (2) aggravates the injury the plaintiff suffered as a result of the defendant's tortious conduct." **Herrera v. Lerma**, 2018 COA 141, ¶ 8, 440 P.3d 1194, 1197; *see also* **McLaughlin v. BNSF Ry. Co.**, 2012 COA 92, ¶¶ 35-50, 300 P.3d 925 (in an action brought under the Federal Employers' Liability Act, the court presents an in-depth discussion of the interrelationship between an eggshell instruction and an aggravation instruction).

4. Compare this instruction with Instruction 6:7. If both this instruction and Instruction 6:7 are given to the jury, some modification of this instruction may be necessary and an instruction clarifying for the jury how both should be applied should be given. *See* **McLaughlin**, ¶ 44.

5. The term "aggravated" has two common meanings: (1) to make worse or more severe; and (2) to produce inflammation, or irritate. In certain cases, only one definition may be legally correct. If the term would be ambiguous in a particular factual situation, it should be further defined. **Lascano v. Vowell**, 940 P.2d 977 (Colo. App. 1996); *see also* **Mendoza v. Pioneer Gen. Ins. Co.**, 2014 COA 29, ¶ 29, 365 P.3d 371 (when term in jury instructions is not defined, jury is presumed to have applied the common meaning of the word (citing **Lascano**, 940 P.2d at 982)).

### Source and Authority

1. This instruction is supported by **Intermill v. Heumesser**, 154 Colo. 496, 391 P.2d 684 (1964); **Newbury v. Vogel**, 151 Colo. 520, 379 P.2d 811 (1963); **Lawson v. Safeway, Inc.**, 878 P.2d 127 (Colo. App. 1994); **Hildyard v. Western Fasteners, Inc.**, 33 Colo. App. 396, 522 P.2d 596 (1974) (specifically approving former instruction); and **McLaughlin**, 2012 COA 92, ¶ 44.

2. The last two paragraphs of this instruction (the second paragraph



of the former instruction) adequately and correctly state the law, and consequently it is not necessary to include in this instruction any statement concerning the burden of proof on the issue of apportionment. **Stephens v. Koch**, 192 Colo. 531, 561 P.2d 333 (1977).

3. The pro rata liability statute, § 13-21-111.5, C.R.S., does not modify or provide an alternative to the doctrine of apportionment set forth in this instruction. **Fried v. Leong**, 946 P.2d 487 (Colo. App. 1997).

## 6:9 DAMAGES CAUSED BY UNRELATED SECOND EVENT

The plaintiff, *(name)*, claims damages from the defendant, *(name)*, for (injuries) (damages) (losses) caused by (a) (an) *(insert appropriate description of event, e.g., "auto accident on June 24, 20—")*. If you find that the defendant's *(insert appropriate description, e.g., "negligence")*, if any, was a cause of any such (injuries) (damages) (losses), then the plaintiff may recover all damages caused by that event. But if you find the plaintiff was later injured in (a) (an) *(insert appropriate description of second event, e.g., "toboggan accident on January 3, 20—")* which was not caused by any acts or omissions of the defendant, then the plaintiff may not recover any damages caused only by the *(insert description of second event, e.g., "toboggan accident")*.

If you find the *(insert description of second event, e.g., "toboggan accident on January 3, 20—")* (increased) (aggravated) (worsened) any (injuries) (damages) (losses) caused by the *(insert description of first event, e.g., "auto accident on June 24, 20—")*, then you must separate, if possible, those damages caused by the *(description of first event, e.g., "auto accident")* from those caused by the *(description of second event, e.g., "toboggan accident")*, and the plaintiff may recover all those separate damages caused by the *(description of first event, e.g., "auto accident")*.

If it is not possible to separate any damages caused by the *(description of first event, e.g., "auto accident on June 24, 20—")* from any caused by the *(description of second event, e.g., "toboggan accident on January 3, 20—")*, then the plaintiff may recover those damages only from the date of the *(description of first event, e.g., "auto accident on June 24, 20—")* to the date of the *(description of second event, e.g., "toboggan accident on January 3, 20—")*.

### Notes on Use

1. The rules stated in this instruction apply to a fact situation

where the plaintiff's injuries have been aggravated by a subsequent accident or injury which was not causally related to the accident involving the defendant or to other conduct of the defendant. *See, e.g., Garhart v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571 (Colo. 2004) (second event instruction not warranted where injury was causally related through the defendant's conduct to prior or concurrent injury).

2. Use whichever parenthesized words are appropriate.

3. When there is sufficient evidence that the defendant's conduct may have aggravated a preexisting condition of the plaintiff, Instruction 6:8 should be used rather than this instruction.

4. This instruction must be appropriately modified in any case involving multiple parties or one or more designated nonparties.

5. The term "aggravated" has two common meanings: (1) to make worse or more severe; and (2) to produce inflammation, or irritate. In certain cases, only one definition may be legally correct. If the term would be ambiguous in a particular factual situation, it should be further defined. *Lascano v. Vowell*, 940 P.2d 977 (Colo. App. 1996); *see also Mendoza v. Pioneer Gen. Ins. Co.*, 2014 COA 29, ¶ 29, 365 P.3d 371 (when term in jury instructions is not defined, jury is presumed to have applied the common meaning of the word (citing *Lascano*, 940 P.2d at 982)).

6. This instruction may be given even if there is no evidence that the subsequent injury was permanent. *Francis ex rel. Goodridge v. Dahl*, 107 P.3d 1171 (Colo. App. 2005).

7. It is an abuse of discretion to give this instruction if there is no evidence that the second event caused any injury or an aggravation of any existing injury. *Herrera v. Lerma*, 2018 COA 141 ¶¶ 8–9, 440 P.3d 1194.

### Source and Authority

1. This instruction is supported by *Brown v. Kreuser*, 38 Colo. App. 554, 560 P.2d 105 (1977) (jury properly instructed that it could consider exacerbation of auto accident-related injuries by subsequent fall where physician testified as to condition of the injuries both before and after the occurrence of the second accident); and *Lascano*, 940 P.2d 981-82 (where it was not possible to separate damages caused by motor vehicle accident and subsequent accidents, instruction that plaintiff could recover damages only from the date of motor vehicle accident to the date of the first subsequent injury was proper). *See also Francis*, 107 P.3d at 1175 (subsequent injury instruction allowed where plaintiff suffered a fall from a pommel horse after auto accident); *Smartt v. Lamar Oil Co.*, 623 P.2d 73 (Colo. App. 1980) (subsequent fall due to tripping on bathroom rug); *Romero v. Parker*, 619 P.2d 89 (Colo. App. 1980) (subsequent auto accident).

2. The principles of this instruction are not limited to subsequent accidents causing physical injuries, but apply to other subsequent events as well, such as a job layoff. **Guerrero v. Bailey**, 658 P.2d 278 (Colo. App. 1982).



## 6:10 EFFECT OF INCOME TAX AND OTHER ECONOMIC FACTORS ON AWARD OF DAMAGES

### Special Note

The Committee has taken no position on the formulation of instructions dealing with “economic factors” as they may affect an award of damages.

### Notes on Use

1. In personal injury actions, an instruction on the nontaxability of damage awards as income should not be given. **Rego Co. v. McKown-Katy**, 801 P.2d 536 (Colo. 1990).

2. Even before **Rego**, the court of appeals had upheld trial court decisions not to give such an instruction. See **Ford v. Bd. of Cty. Comm’rs**, 677 P.2d 358 (Colo. App. 1983) (wrongful death action); **Hildyard v. W. Fasteners, Inc.**, 33 Colo. App. 396, 522 P.2d 596 (1974); **Polster v. Griff’s of Am., Inc.**, 32 Colo. App. 264, 514 P.2d 80 (1973), *rev’d on other grounds*, 184 Colo. 418, 520 P.2d 745 (1974); **Davis v. Fortino & Jackson Chevrolet Co.**, 32 Colo. App. 222, 510 P.2d 1376 (1973); see also **Landsberg v. Hutsell**, 837 P.2d 205 (Colo. App. 1992).

3. In **In re Estate of Beren**, 2012 COA 203M, ¶¶ 144-45, 412 P.3d 487, *aff’d in part, rev’d in part on other grounds sub nom. Beren v. Beren*, 2015 CO 29, 349 P.3d 233, the court of appeals declined to adopt a rule that a party ordered to repay amounts received pursuant to a reversed judgment is entitled to a credit for taxes paid on the amount erroneously distributed. The court held, however, that on remand the trial court had discretion (1) to hear evidence concerning the amount of taxes paid and the steps taken to seek a refund and (2) to stay for a reasonable time that portion of the repayment obligation attributable to the disputed taxes while her claim for the tax refund was litigated.

4. In **Hoyal v. Pioneer Sand Co., Inc.**, 188 P.3d 716 (Colo. 2008), the Colorado Supreme Court upheld a trial court’s exclusion of evidence of potential future income taxes in calculating economic damages in a wrongful death action, concluding that the evidence would be distracting, speculative, and contrary to a goal of the tort system, compensating victims. In dicta, the court indicated the same considerations applied in personal injury actions. *But see* **Lewis v. Great W. Distrib. Co. of Borger**, 168 Colo. 424, 451 P.2d 754 (1969) (noting that the determination of net pecuniary loss in a wrongful death case contemplates deduction of income taxes).

5. In **Norfolk & W. Ry. v. Liepelt**, 444 U.S. 490 (1980), the U.S.

Supreme Court held in a wrongful death case brought under the Federal Employers' Liability Act, where the measure of damages is the loss of pecuniary benefits the beneficiaries might reasonably have received from the deceased, that (1) evidence concerning income taxes the deceased would have paid on estimated future earnings is admissible, and (2) it was error "in this case" to refuse to give the jury a cautionary instruction that any award they might make would not be subject to income taxes and consequently such taxes should not be considered by them in determining the amount of any award. In **Rego**, 801 P.2d at 538, the Colorado Supreme Court declined to follow **Liepelt**. See also **Gulf Offshore Co. v. Mobil Oil Corp.**, 453 U.S. 473 (1981) (discussing when, as to federal causes of action triable in either federal or state courts, the giving of such a cautionary instruction should be determined as a matter of federal law or state law). On the other hand, "the failure to give [a] non-taxability instruction [in a FELA case not involving wrongful death] is harmless error unless there is a showing that the verdict is excessive." **Marlow v. Atchison, Topeka & Santa Fe Ry.**, 671 P.2d 438, 442 (Colo. App. 1983).

6. For a discussion of both income taxes and inflation, see **Good v. A.B. Chance Co.**, 39 Colo. App. 70, 565 P.2d 217 (1977).

7. Any tax benefits the plaintiff may receive from being able to write off losses caused by the defendant should not be deducted from the plaintiff's damages, and if evidence of such tax benefits is received, the court should instruct the jury that it should not consider the effect of income taxes when determining the amount of plaintiff's damages. **Boettcher & Co. v. Munson**, 854 P.2d 199 (Colo. 1993).

## B. DAMAGES FOR LOSS OR DESTRUCTION OF PERSONAL PROPERTY

### 6:11 PERSONAL PROPERTY—DIFFERENCE IN MARKET VALUE

If you find in favor of the plaintiff, (*name*), you shall award as (his) (her) actual damages the difference between the market value of the property immediately before and its market value immediately after the occurrence.

#### Notes on Use

This instruction should be used where the property damaged has a market value, and there is evidence of total or substantial destruction. *Cf.* Notes on Use to Instruction 6:12. In certain cases the plaintiff may be entitled to other damages as well. *See, e.g.*, the authority cited below in Source and Authority; *see also Cope v. Vermeer Sales & Serv. of Colo., Inc.*, 650 P.2d 1307, 1309 (Colo. App. 1982) (holding that plaintiff was entitled to recover loss of profits anticipated from use of negligently damaged property, and stating, “[t]he rule which precludes recovery of uncertain and speculative damages applies only where the fact of damages is uncertain, not where the amount is uncertain”).

#### Source and Authority

1. This instruction is supported by **Goodyear Tire & Rubber Co. v. Holmes**, 193 P.3d 821 (Colo. 2008); **Zwick v. Simpson**, 193 Colo. 36, 572 P.2d 133 (1977); **State v. Morison**, 148 Colo. 79, 365 P.2d 266 (1961); **Trujillo v. Wilson**, 117 Colo. 430, 189 P.2d 147 (1948) (plaintiff also entitled to recover expense of reasonable efforts to preserve or restore the property); and **Airborne, Inc. v. Denver Air Center, Inc.**, 832 P.2d 1086 (Colo. App. 1992) (diminution in value must be based on market prices at the time of the occurrence, not on the date of trial).

2. Under sections 5-12-102(1)(a) and (b), C.R.S., prejudgment interest, calculated by the court rather than the jury, is recoverable on damages for injury to personal property. **Isbill Assocs., Inc. v. City & Cty. of Denver**, 666 P.2d 1117 (Colo. App. 1983).

3. In the absence of fraud, malice, or other willful and wanton conduct, there is generally no recovery in trespass and negligence cases for mental suffering for damage to or the loss of personal property. **Webster v. Boone**, 992 P.2d 1183 (Colo. App. 1999). Nor is recovery permitted for the sentimental or emotional value of lost or damaged personal property such as keepsakes and mementos even though such items may have no market value or the value to the owner is far greater



than the market value. *Id.*; cf. **Chryar v. Wolf**, 21 P.3d 428 (Colo. App. 2000) (in outrageous conduct case, sentimental value of lost or damaged property may be considered in assessing damages for emotional distress).



## 6:12 PERSONAL PROPERTY—COST OF REPAIRS

If you find in favor of the plaintiff, (*name*), you shall award as (his) (her) actual damages both the reasonable cost of (repairing) (rebuilding) the property, and the decrease in market value, if any, to the property as (repaired) (rebuilt).

If the cost of (repairs) (rebuilding) and any decrease in market value of the property as (repaired) (rebuilt) is more than the market value of the property before the occurrence, your award shall be limited to the market value of the property before the occurrence.

### Notes on Use

1. This instruction should be used when: the personal property has been damaged, but not destroyed, and repairs are feasible; the property has no market value; repairs have already been made; or repair costs will more effectively compensate the plaintiff. *See generally Bd. of Cty. Comm'rs of Weld Cty. v. Slovek*, 723 P.2d 1309 (Colo. 1986); *Zwick v. Simpson*, 193 Colo. 36, 572 P.2d 133 (1977). Selection of which measure of damages to use is within the discretion of the trial court. *Slovek*, 723 P.2d at 1316. *Cf.* Notes on Use to Instruction 6:11.

2. Use whichever parenthesized words are most appropriate.

3. The concept of depreciation has been included in the second paragraph of this instruction. Consequently, where the property may have appreciated in value, or would have done so had the occurrence not transpired, this second paragraph should be omitted or, if given, be appropriately modified. *McAlonan v. U.S. Home Corp.*, 724 P.2d 78 (Colo. App. 1986).

4. Under section 5-12-101(1)(b), C.R.S., in a strict liability case where repair costs are appropriate damages, prejudgment interest accrues from the date plaintiff pays the repair or replacement expenditure. *Goodyear Tire & Rubber Co. v. Holmes*, 193 P.3d 821 (Colo. 2008).

5. This instruction should be appropriately modified in a case brought under the Construction Defect Action Reform Act, §§ 13-20-801 to -808, C.R.S. ("CDARA"). *See Hildebrand v. New Vista Homes II, LLC*, 252 P.3d 1159 (Colo. App. 2010) (Actual damages in CDARA case are the lesser of the fair market value of the real property without the alleged construction defect, the replacement cost of the real property, or the reasonable cost to repair the alleged construction defect; damages for inconvenience may also be awarded.).

### Source and Authority

This instruction is supported by **Callaham v. Slavsky**, 153 Colo. 291, 385 P.2d 674 (1963) (by implication); **Allison v. Heller**, 132 Colo. 415, 289 P.2d 160 (1955) (plaintiff entitled to have property restored as nearly as possible to its condition before accident); and **Airborne, Inc. v. Denver Air Center, Inc.**, 832 P.2d 1086 (Colo. App. 1992) (if damage to property is reparable, plaintiff is entitled to recover reasonable costs of repair together with any decrease in market value as repaired). See also **McAlonan**, 724 P.2d at 79-80 (approving first paragraph and applying it in action to recover costs of repairs needed to bring new condominium up to quality contracted for).

## 6:13 PERSONAL PROPERTY—LOSS OF USE

If you find in favor of the plaintiff, you shall also award an amount which will reasonably compensate the plaintiff for any loss of use of (his) (her) (*insert description of property*) during the time reasonably required to make the necessary repairs. These damages must be proven by a preponderance of the evidence. The measure of these damages is the (*the reasonable rental value of the [insert description]*) (*the reasonable cost of renting or replacing a similar [insert description] for use*) (*lost profits*) while repairs are being made.

### Notes on Use

1. Use whichever parenthesized phrase is more appropriate.
2. This instruction, appropriately modified, also may be used in cases involving the destruction of property—in contrast to injury or damage to property—with the award of damages for lost profits limited to a reasonable period of time to complete a preexisting contract with a replacement item. See **Duggan v. Bd. of Cty. Comm’rs**, 747 P.2d 6 (Colo. App. 1987); see also **Koenig v. PurCo Fleet Servs., Inc.**, 2012 CO 56, ¶ 3, 285 P.3d 979.

### Source and Authority

1. This instruction is supported by **Airborne, Inc. v. Denver Air Center, Inc.**, 832 P.2d 1086 (Colo. App. 1992). The right to recover damages for loss of use has been expressly or implicitly recognized in **Rogers v. Funkhouser**, 121 Colo. 13, 212 P.2d 497 (1949) (automobile); **Hunter v. Quaintance**, 69 Colo. 28, 168 P. 918 (1917) (automobile); and **Jackson v. Kiel**, 13 Colo. 378, 22 P. 504 (1889) (obstruction by public nuisance of access to real property). See also **Wagner v. Dan Unfug Motors, Inc.**, 35 Colo. App. 102, 529 P.2d 656 (1974) (holding that damages for the loss of personal use of a vehicle were recoverable in fraud and deceit case when they have been pleaded and reduced to a definite rental cost, and distinguishing the contrary dictum in **Hunter**, 69 Colo. at 30, 168 P. at 919); **Francis v. Steve Johnson Pontiac-GMC-Jeep, Inc.**, 724 P.2d 84 (Colo. App. 1986) (same).

2. Loss of use damages can be measured by either lost profits or reasonable rental value incurred during a reasonable repair or replacement period. The property owner is not required to prove that the owner actually lost the chance for income from the rental. Rather, the property owner is entitled to recover because the owner lost the right to earn a profit from the rental. **Koenig**, 2012 CO 56, ¶ 14. However, in a

case involving loss of use of a personal vehicle while it is repaired, damages may be recovered even without an actual loss. **Francis**, 724 P.2d at 86 (in tort case, loss is presumed if personal auto is unavailable, even though no replacement auto is rented).

3. "Loss of use" damages must be specially pleaded. **Rogers**, 121 Colo. at 24-25, 212 P.2d at 502.



## C. MULTIPLE RECOVERY

### 6:14 MULTIPLE RECOVERY PROHIBITED (WHEN PLAINTIFF SUING ON ALTERNATIVE BUT DUPLICATIVE CLAIMS FOR RELIEF)

The plaintiff, (*name*), has sued for the same (injuries) (damages) (losses) on (*number*) different claims for relief. The claims for relief on which the plaintiff has sued and on which you have been instructed are: (*insert appropriate description of each of the plaintiff's claims*).

If you find for the plaintiff on more than one claim for relief, you may award (him) (her) damages only once for the same (injuries) (damages) (losses).

#### Notes on Use

1. Where a party prevails on multiple claims seeking the same damages, the jury must award the full amount of damages it finds but must award those damages only once. The Committee recommends that, wherever possible, the jury be given unified step-by-step special verdict forms (*see, e.g.*, Instruction 4:20) that should lead the jury to award the full amount of damages it intends but minimize the risk of awarding the same damages more than once.

2. In **Schuessler v. Wolter**, 2012 COA 86, 310 P.3d 151, the jury awarded an identical amount against each of two defendants for noneconomic damages. One defendant argued on appeal that the jury had impermissibly awarded the same damages twice. The court of appeals disagreed and affirmed the damage award because Instruction 6:14 had been given, and the court presumed that the jury had followed it. *Id.* at ¶ 65. The court further stated: "When multiple claims are presented that are duplicative in terms of their recoverable damages, an instruction prohibiting multiple recoveries for the same damages must be given." *Id.* at ¶ 64.

3. In **Steward Software Co. v. Kopcho**, 275 P.3d 702 (Colo. App. 2010), *rev'd on other grounds*, 266 P.3d 1085 (Colo. 2011), in contrast, the court reversed a judgment involving multiple claims for the same damages even though this instruction was given. Plaintiff asserted three claims for the same damages, and the jury found for plaintiff on all three. However, the jury awarded substantive damages on one claim and nominal damages on the other two. While declining to conclude that "pattern instruction 6:14, standing alone, was erroneous," the court

held that under all the circumstances of the case and in the absence of other clarifying instructions, “the instructions as a whole erroneously prevented the jury from awarding the same damages on all three of [plaintiff’s] claims.” 275 P.3d at 711. In such cases, the court held, “the jury must be directed to award the same damages on all three claims if the damages are proven as to those claims.” *Id.*

4. In cases with multiple claims seeking the same damages, the Committee recommends that the issues illustrated by **Schuessler** and **Steward Software** be dealt with primarily by designing the special verdict form to lead the jury step-by-step through the decision-making process. Additional clarifying instructions may be necessary. **Steward Software**, 275 P.3d at 711. For example, in a case where a single plaintiff asserts three claims against a single defendant for the same damages, the verdict form should direct the jury, using or adapting the format in Instructions 4:15, 4:16, and 4:20, to decide which party prevailed on each claim. If the jury finds for the plaintiff on any of the claims, the jury should be directed to answer a separate single question asking the jury to state the amount of damages. The damages question should be introduced with a direction, in sum or substance, that plaintiff has asserted three claims for the same damages and that consequently the jury’s answer to the damages question must be the same regardless of whether the jury found for the plaintiff on one, two, or all three claims. If the plaintiff asserts other claims for different damages, the verdict form then would lead the jury to decide those claims.

5. Some cases are more complex because, for example, the damages awardable on two claims overlap but are not identical, or some claims are asserted by or against fewer than all plaintiffs or defendants. Most of these cases can be addressed by the recommended approach. For example, where the same economic damages are sought on both tort and contract claims, non-economic damages may be sought only on the tort claim. This situation can be dealt with by asking the jury to state separately the amounts of economic and non-economic damages. After the verdict, counsel and the court can readily determine the damages to be included in the judgment.

6. See also **Am. Furniture Co. v. Veazie**, 131 Colo. 340, 281 P.2d 803 (1955); **Andrews v. Picard**, 199 P.3d 6 (Colo. App. 2007); **Colo. Homes, Ltd. v. Loerch-Wilson**, 43 P.3d 718 (Colo. App. 2001); **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev’d on other grounds*, 928 P.2d 1315 (Colo. 1996); **Rusch v. Lincoln-Devore Testing Lab., Inc.**, 698 P.2d 832 (Colo. App. 1984).

#### Source and Authority

1. This instruction is supported by **American Furniture Co.**, 131 Colo. at 346, 281 P.2d at 806. In that case, the court noted in dictum that the confusion of the verdict forms could have been avoided by requiring the plaintiff to elect his remedy before the case was submitted

to the jury. However, the court did not state that such necessarily should have been done, and other authority clearly indicates that in the absence of unusual circumstances, the plaintiff is entitled to go to the jury on alternative theories, if there is sufficient evidence supporting each theory. See **Carpenter v. Donohoe**, 154 Colo. 78, 388 P.2d 399 (1964) (when remedies are consistent, a party is entitled to pursue either or both until satisfaction of one is obtained); see also C.R.C.P. 18(a), 318(a); **Stewart v. Blanning**, 677 P.2d 1382, 1384 (Colo. App. 1984) (requiring election of remedies not appropriate unless the "remedial rights sought in a given situation are so inconsistent that the assertion of one necessarily repudiates the assertion of the other").

2. The rule prohibiting double recovery for the same injury on multiple claims for relief also applies in cases involving multiple defendants. **Quist v. Specialties Supply Co.**, 12 P.3d 863 (Colo. App. 2000).

## **CHAPTER 7. LEGAL RELATIONSHIPS**

### **A. MINORS**

7:1 Minor Child—Defined—Right to Sue or Defend

7:2 Emancipation—Defined

### **B. PARTNERSHIPS AND JOINT VENTURES**

7:3 General Partnership—Defined

7:4 Joint Venture—Defined

7:5 Joint Venture in Operation of Vehicle or Other  
Instrumentality—Defined

7:6 Joint Venture—Imputing Negligence Among Joint Venturers

### **C. ENTITIES**

7:7 Entity Acts Through Individuals



## A. MINORS

### 7:1 MINOR CHILD—DEFINED—RIGHT TO SUE OR DEFEND

A person who is younger than 18 years old is a minor child. An adult must (sue) (defend) as (*insert appropriate description, e.g., “guardian,” “next friend,” “conservator,” etc.*) in place of the minor.

#### Notes on Use

1. Use whichever word, “sue” or “defend,” is appropriate.
2. This instruction should be used in conjunction with Instructions 6:2, 6:3, and 6:4, as applicable.

#### Source and Authority

1. This instruction is supported by C.R.C.P. 17(c) and 317(c), and section 13-22-101(1)(c), C.R.S. *See also* § 2-4-401(6), C.R.S. (absent express statutory language to the contrary, general statutory definition of a “minor” is one who has not attained age of twenty-one years). For a discussion of the rights of a person over eighteen but not yet twenty-one as specified in the age of competence statute, § 13-22-101(1)(d), C.R.S., including the right to make his or her own decisions regarding domestic matters, see **In re Marriage of Tibbetts**, 2018 COA 117, ¶ 19, 428 P.3d 686.

2. A minor is not competent to sue without a guardian ad litem or someone acting on his or her behalf before eighteen years of age. **Elgin v. Bartlett**, 994 P.2d 411 (Colo. 1999). However, a parent does not have a duty to litigate a minor’s personal injury claim. *Id.*; *see also* **Cintron v. City of Colo. Springs**, 886 P.2d 291 (Colo. App. 1994). For a discussion of whether a minor or the parents are entitled to sue for pre-majority expenses and damages, see **Pressey v. Children’s Hospital Colorado**, 2017 COA 28, ¶¶ 26–31, 488 P.3d 151.

## 7:2 EMANCIPATION—DEFINED

**A minor child is emancipated when the child has been freed from parental care, custody, and control.**

### Notes on Use

This instruction should be used in conjunction with Instructions 6:2, 6:3, and 6:4, as applicable.

### Source and Authority

1. This instruction is supported by **Union Pacific Ry. v. Jones**, 21 Colo. 340, 40 P. 891 (1895). See **Pawnee Farmers' Elevator & Supply Co. v. Powell**, 76 Colo. 1, 227 P. 836 (1924); **In re Application of Connolly**, 761 P.2d 224 (Colo. App. 1988), *rev'd on other grounds sub nom. Abrams v. Connolly*, 781 P.2d 651 (Colo. 1989); **Napolitano v. Napolitano**, 732 P.2d 245 (Colo. App. 1986) (significant factors in determining emancipation include child's financial independence and whether child has established a residence away from family domicile); **In re Marriage of Clay**, 670 P.2d 31 (Colo. App. 1983) (minor not emancipated where evidence undisputed that child was still dependent on parents for support and shelter); **In re Marriage of Robinson**, 43 Colo. App. 171, 601 P.2d 358 (1979) (for parental support purposes, a 19-year-old child is not emancipated while employed full-time and living away from home on a temporary basis with intention of returning to school and parental support), *aff'd*, 629 P.2d 1069 (Colo. 1981); **In re Marriage of Weisbart**, 39 Colo. App. 115, 564 P.2d 961 (1977); **Van Orman v. Van Orman**, 30 Colo. App. 177, 492 P.2d 81; see also § 2-4-401(6), C.R.S. (absent express statutory language to the contrary, general statutory definition of a "minor" is one who has not attained age of 21 years).

2. For purposes of determining child support, a child is considered emancipated when the child becomes nineteen, marries, enters active military service, or the court finds the child is emancipated based on other facts. § 14-10-115(13), C.R.S.

3. An emancipated minor has the right to sue for all pre-majority damages and expenses. **Pressey v. Children's Hosp. Colo.**, 2017 COA 28, ¶¶ 25–31, 488 P.3d 151.

## B. PARTNERSHIPS AND JOINT VENTURES

### 7:3 GENERAL PARTNERSHIP—DEFINED

**A partnership is an association of two or more persons to carry on as co-owners a business for profit.**

#### Notes on Use

1. This instruction may require appropriate modifications where a limited partnership is involved. For the definition of limited partnerships, see Colorado Uniform Limited Partnership Act of 1981, §§ 7-62-101 to -110, C.R.S., and Uniform Limited Partnership Law of 1931, §§ 7-61-101 to -130, C.R.S. However, the liability of the general partner of a limited partnership is the same as for partners of a partnership without limited partners. **Black v. First Fed. Sav. & Loan Ass'n**, 830 P.2d 1103 (Colo. App. 1992), *aff'd sub nom. La Plata Med. Ctr. Assocs. v. United Bank*, 857 P.2d 410 (Colo. 1993); see also Colorado Limited Partnership Association Act, §§ 7-63-101 to -116, C.R.S.

2. This instruction may require appropriate modifications where there is a question as to whether the parties intended to form a partnership. The Colorado Uniform Partnership Act of 1997, § 7-64-101(18), C.R.S., defines a "partner" as "a person who is admitted to a partnership as a partner of the partnership." Under section 7-64-202(1), C.R.S., "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership." For rules determining whether a partnership has been formed under specified circumstances, see section 7-64-202(3). For additional statutory rules that may be relevant in determining the existence or non-existence of a partnership, refer to section 7-60-107, C.R.S. (setting forth rules that apply to determining existence of partnership); see also **Yoder v. Hooper**, 695 P.2d 1182, 1187 (Colo. App. 1984), *aff'd*, 737 P.2d 852 (Colo. 1987) (a contract to create a partnership may be express or implied and "no express agreement is necessary; rather, a partnership may be formed by the conduct of the parties"). As to what associating "for profit" means, see **Colorado Performance Corp. v. Mariposa Assocs.**, 754 P.2d 401 (Colo. App. 1987).

#### Source and Authority

1. This instruction is supported by section 7-60-106(1), C.R.S. That section provides: "A partnership is an association of two or more persons to carry on, as co-owners, a business for profit and includes, without limitation, a limited liability partnership."

2. The parties' intent is not controlling. There may be a partnership in fact even though the parties never intended that a partnership exist. **Bond-Connell Sheep & Wool Co. v. Snyder**, 68 Colo. 238, 188 P. 740 (1920).

3. A partnership may exist for a single transaction. **Kayser v. Mongham**, 8 Colo. 232, 6 P. 803 (1885).

4. If the general partner powers are illusory, the partnership interest may actually be a security. There is a strong presumption that an interest in a general partnership is not an investment contract under the Colorado Securities Act. See **Chan v. HEI Res., Inc.**, 2020 COA 87, ¶¶ 22–33, 490 P.3d 789 (*cert. granted in part* Apr. 12, 2021).



## 7:4 JOINT VENTURE—DEFINED

There is a joint venture if you find all three of the following:

1. A joint interest in the (property) (project);
2. An express or implied agreement between two or more persons to share jointly in the profits or losses of that (property) (project); and
3. Conduct showing joint cooperation in the (property) (project).

### Notes on Use

1. Instruction 7:5 should be used when a joint venture in the operation of a motor vehicle or other instrumentality is alleged.

2. This instruction should be appropriately modified to reflect whether the joint venture is in a property or project.

### Source and Authority

1. This instruction is supported by **Sleeping Indian Ranch v. West Ridge Group**, 119 P.3d 1062 (Colo. 2005); **Compass Insurance Co. v. City of Littleton**, 984 P.2d 606 (Colo. 1999); **People v. McCain**, 191 Colo. 229, 552 P.2d 20 (1976); **Edwards v. Price**, 191 Colo. 46, 550 P.2d 856 (1976); **Breckenridge Co. v. Swales Management Corp.**, 185 Colo. 160, 522 P.2d 737 (1974); **Transit Equipment Co. v. Dyonisio**, 154 Colo. 379, 391 P.2d 478 (1964); **Realty Development Co. v. Felt**, 154 Colo. 44, 387 P.2d 898 (1963); **Scott R. Larson, P.C. v. Grinnan**, 2017 COA 85, ¶ 45, 488 P.3d 202; **Freyer v. Albin**, 5 P.3d 329 (Colo. App. 1999); **A.B. Hirschfeld Press, Inc. v. Weston Group, Inc.**, 824 P.2d 44 (Colo. App. 1991), *aff'd*, 845 P.2d 1162 (Colo. 1993); **Agland, Inc. v. Koch Truck Line, Inc.**, 757 P.2d 1138 (Colo. App. 1988); **Colorado Performance Corp. v. Mariposa Assocs.**, 754 P.2d 401 (Colo. App. 1987); **Werkmeister v. Robinson Dairy, Inc.**, 669 P.2d 1042 (Colo. App. 1983) (joint venture requires parties to combine their property, money, or effects in furtherance of venture; “community of interest” alone is not sufficient); **McNeill v. Allen**, 35 Colo. App. 317, 534 P.2d 813 (1975); and **Bainbrich v. Wells**, 28 Colo. App. 432, 476 P.2d 53 (1970), *aff'd*, 176 Colo. 503, 491 P.2d 976 (1971).

2. Parties are not joint venturers if one of the parties receives a fixed sum irrespective of the venture’s profits or losses, or if one of the parties could have enjoyed an individual profit while the other might have sustained an individual loss. See **Batterman v. Wells Fargo Ag**

**Credit Corp.**, 802 P.2d 1112 (Colo. App. 1990). A joint venture existed between lawyers for purpose of representing plaintiffs and sharing in contingent fee where lawyers were “associated,” agreed to share in the contingent fee, and cooperated in bringing plaintiffs’ case. **Scott R. Larson**, 2017 COA 85, ¶¶ 45-47.

3. The substantive law of partnerships applies to joint ventures, and the rights of a party to a joint venture are subject to the joint venture agreement. **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998); **Fey Concert Co. v. City & Cty. of Denver**, 940 P.2d 972 (Colo. App. 1996) (holding joint venture subject to general law of partnerships), *rev’d on other grounds*, 960 P.2d 657 (Colo. 1998); see also **Scott R. Larson**, 2017 COA 85, ¶ 45 (holding “substantive law of partnership must be applied in determining whether a joint venture exists”). The presumption that a general partnership is not an investment contract also applies to joint ventures. See **Chan v. HEI Res., Inc.**, 2020 COA 87, ¶¶ 28-33, 490 P.3d 789 (*cert. granted in part* Apr. 12, 2021). Although parties to a joint venture owe a fiduciary duty to one another, parties may modify or disclaim a fiduciary relationship. **Rocky Mountain Expl., Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 62, 420 P.3d 223.

## 7:5 JOINT VENTURE IN OPERATION OF VEHICLE OR OTHER INSTRUMENTALITY—DEFINED

For a joint venture or a joint enterprise to exist regarding operation of a (vehicle) (*description of other instrumentality involved*), you must find that:

1. Two or more persons united in pursuit of a common purpose; and

2. Each person must have a right to control the operation of the (vehicle) (*description of any other instrumentality involved*) used by the parties in pursuit of the common purpose.

The common purpose may be for the parties' profit, pleasure, or convenience.

### Notes on Use

1. This instruction should be used only when a joint venture in the operation of automobiles is alleged.

2. When two or more joint owners occupy a vehicle, or another person drives the vehicle with an owner as a passenger, Instruction 11:18 may also apply.

### Source and Authority

1. This instruction is supported by **Watson v. Regional Transportation District**, 762 P.2d 133 (Colo. 1988); **Mayer v. Sampson**, 157 Colo. 278, 402 P.2d 185 (1965); **Parker v. Ullom**, 84 Colo. 433, 271 P. 187 (1928); **Boyd v. Close**, 82 Colo. 150, 257 P. 1079 (1927); **American Family Mutual Insurance Co. v. AN/CF Acquisition Corp.**, 2015 COA 129, ¶ 12, 361 P.3d 1098; and **Bainbrich v. Wells**, 28 Colo. App. 432, 476 P.2d 53 (1970), *aff'd*, 176 Colo. 503, 491 P.2d 976 (1971).

2. A joint venture does not exist when evidence of the right to control is lacking. See **Pyles-Knutzen v. Bd. of County Comm'rs**, 781 P.2d 164 (Colo. App. 1989); **Bainbrich**, 28 Colo. App. at 434, 476 P.2d at 54; see also **Seal v. Lemmel**, 140 Colo. 387, 344 P.2d 694 (1959); **Denver Tramway Co. v. Orbach**, 64 Colo. 511, 172 P. 1063 (1918); cf. Instruction 9:24 (negligence or fault of designated nonparty).

3. "Rights to control existing between a member of the joint venture and a third party are not relevant to a determination of the existence of



the joint venture or as to rights of control as between participants in the joint venture.” **Bilsten v. Porter**, 33 Colo. App. 208, 211–12, 516 P.2d 656, 658 (1973) (sufficient evidence for jury to conclude that son possessed some measure of control over the operation of a vehicle even if he drove the vehicle without his father’s permission).

4. As between themselves, the negligence of one joint venturer is not imputed to the other to bar or reduce the latter’s claim against the former. **Price v. Sommermeyer**, 41 Colo. App. 147, 584 P.2d 1220 (1978), *aff’d*, 198 Colo. 548, 603 P.2d 135 (1979).

5. A driver’s negligence may be imputed to a defendant-owner-passenger on the theory of joint venture in order to hold the owner-passenger liable to a plaintiff third party. *See AN/CF Acquisition Corp.*, 2015 COA 129, ¶ 13 (“Colorado courts have applied the joint venture doctrine to hold defendant passengers vicariously liable for drivers’ negligence in a line of cases dating back nearly a century.”). However, a driver’s negligence is not imputable to an owner-passenger in a claim brought by the owner-passenger against a defendant third party. *See Watson*, 762 P.2d at 141 (overruling several cases that applied the imputed contributory negligence rule to a plaintiff-owner-passenger). A driver-customer and passenger-dealership salesperson were engaged in a joint venture where (a) they shared a common purpose in conducting the test drive and (b) the salesperson owned the vehicle, accompanied the customer on the test drive, and selected the route. **AN/CF Acquisition Corp.**, ¶¶ 31-41.



## **7:6 JOINT VENTURE—IMPUTING NEGLIGENCE AMONG JOINT VENTURERS**

**If a joint venture is proved, and you find by a preponderance of the evidence that one joint venturer was negligent, then all joint venturers are considered to be negligent.**

### **Notes on Use**

1. This instruction applies only when a third party sues a joint venturer or a joint venturer sues a third party. It does not apply when the suit is between the joint venturers themselves.

2. For the general definition of “joint venture,” see Instruction 7:4. For the definition of “joint venture in the operation of a vehicle or other instrumentality,” see Instruction 7:5.

3. The Notes on Use to Instruction 7:5 are also applicable to this instruction.

### **Source and Authority**

This instruction is supported by **Bebo Construction Co. v. Mattox & O'Brien, P.C.**, 998 P.2d 475 (Colo. App. 2000). *See also* Source and Authority to Instructions 7:4 and 7:5.

## C. ENTITIES

### 7:7 ENTITY ACTS THROUGH INDIVIDUALS

**(The plaintiff) (The defendant), (*entity's name*), is a (*insert appropriate entity designation, e.g., corporation, municipal corporation, non-profit, etc.*) and can act only through its (*insert appropriate individuals, e.g., officers, employees, managers, etc.*). Any act or omission of (*officers, employees, managers, etc.*) while acting within the scope of (his) (her) employment is the act or omission of the (plaintiff) (defendant), (*entity's name*).**

#### Notes on Use

1. This instruction should be given in cases involving an entity. For other agency relationships, or specific instructions applicable to respondeat superior liability, use the instructions in Chapter 8.
2. When the scope of employment is in dispute, Instruction 8:8 should be given with this instruction.
3. This instruction may be used in contract and tort cases when appropriate.
4. For an example of how this instruction was correctly used, see **Lombard v. Colo. Outdoor Educ. Ctr.**, 266 P.3d 412 (Colo. App. 2011).

#### Source and Authority

This instruction is supported by **Dallas Creek Water Co v. Huey**, 933 P.2d 27 (Colo. 1997); and **Colorado Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2010).

# **CHAPTER 8. LIABILITY BASED ON AGENCY AND RESPONDEAT SUPERIOR**

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### **Introductory Note**

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- 8:20 Principal and Agent—Only Principal Sued—Issue as to Relationship and/or Scope of Authority
- 8:21 Principal and Agent—Only Principal Sued—No Issue as to Relationship and Scope of Authority

## **C. LIABILITY ARISING FROM RESPONDEAT SUPERIOR**

- 8:22 Employer and Employee—Both Parties Sued—Issue as to Relationship and/or Scope of Employment

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- 8:23 Employer and Employee—Both Parties Sued—No Issue as to Relationship and Scope of Employment
- 8:24 Employer and Employee—Only Employer Sued—Issue as to Relationship and/or Scope of Employment
- 8:25 Employer and Employee—Only Employer Sued—FV Issue as to Relationship and Scope of Employment



## A. DEFINITIONS

### 8:1 AGENCY RELATIONSHIP—DEFINED

An agency relationship is created when an agreement, written or oral, express or implied, between two persons establishes that one of them is to act on behalf of and subject to the control of the other. The person who agrees to act on behalf of another is called the agent, and the other is called the principal.

#### Notes on Use

Whether an agency relationship exists is ordinarily a question of fact. **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 81, 440 P.3d 1200; **Christoph v. Colo. Commc'ns Corp.**, 946 P.2d 519 (Colo. App. 1997); *see also* RESTATEMENT (THIRD) OF AGENCY § 1.02 (2006) (whether relationship is characterized as agency in agreement between parties or in context of industry or popular usage is not controlling). However, if evidence as to an agent's authority is undisputed, or if only one reasonable and logical inference could be drawn from the evidence, the question of the existence of the agency relationship is one of law to be determined by the trial court. **Olsen v. Vail Assocs. Real Estate, Inc.**, 935 P.2d 975 (Colo. 1997); **Johnson Realty v. Bender**, 39 P.3d 1215 (Colo. App. 2001); **Filho v. Rodriguez**, 36 P.3d 199 (Colo. App. 2001); **Victorio Realty Grp., Inc. v. Ironwood IX**, 713 P.2d 424 (Colo. App. 1985).

#### Source and Authority

1. This instruction is supported by **City of Aurora v. Colorado State Engineer**, 105 P.3d 595 (Colo. 2005) (agency is a consensual relationship); **City & County of Denver v. Fey Concert Co.**, 960 P.2d 657 (Colo. 1998) (agency results from consensual arrangement in which one person consents to act on behalf of another and be subject to other's control); and **Stortroen v. Beneficial Finance Co.**, 736 P.2d 391, 395 (Colo. 1987) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). *See also* **Rohauer v. Little**, 736 P.2d 403 (Colo. 1987) (in a multiple listing real estate transaction involving residential property, the selling broker or salesperson is an agent of the listing broker and consequently stands in an agency relationship with the seller, but the selling broker is not an agent of the buyer); **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357 (Colo. App. 2007); **Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe**, 107 P.3d 402 (Colo. App. 2004); **Filho**, 36 P.3d at 200; **In re Marriage of Robbins**, 8 P.3d 625 (Colo. App. 2000); **Gorsich v. Double B Trading Co.**, 893 P.2d 1357 (Colo. App. 1994); **Winston Fin. Grp., Inc. v. Fults Mgmt., Inc.**, 872

P.2d 1356 (Colo. App. 1994) (cooperating broker was sub-agent of lessor in commercial leasing context); **Cole v. Jennings**, 847 P.2d 200 (Colo. App. 1992); **Governor's Ranch Prof'l Ctr., Ltd. v. Mercy of Colorado, Inc.**, 793 P.2d 648 (Colo. App. 1990) (agent is one who has the authority to act for or in place of another, or one who is entrusted with the business of another); **Montano v. Land Title Guar. Co.**, 778 P.2d 328, 331 (Colo. App. 1989) ("Agency is a fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act."); **Real Equity Diversification, Inc. v. Coville**, 744 P.2d 756 (Colo. App. 1987) (mere existence of an agreement between a seller's broker and a buyer's broker to share a real estate commission does not make the buyer's broker an agent of the seller); **Victorio Realty Grp.**, 713 P.2d at 425 (agency's existence may be established by the conduct of the parties); **Hart v. Colo. Real Estate Comm'n**, 702 P.2d 763 (Colo. App. 1985); **Cheney v. Hailey**, 686 P.2d 808 (Colo. App. 1984) (citing former version of this instruction); **Shriver v. Carter**, 651 P.2d 436 (Colo. App. 1982); RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (defining agency).

2. Three types of agency relationships exist. The first is a principal-agent relationship, where the agent has contractually agreed to work for the principal's benefit. The second is an employer-employee relationship (formerly referred to as master and servant), where the employer has the right to direct the manner in which the work is performed and the employee has a correlative duty to perform the work in the manner directed. The third is an employer-independent contractor, where the employer does not control the physical activities of the contractor and is concerned only with the result achieved. *See Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995).

3. In determining whether an agency relationship exists, the most important factor is the right to control, not the fact of control. **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993); **W. Fire Truck, Inc. v. Emergency One, Inc.**, 134 P.3d 570, 575 (Colo. App. 2006) ("The control a principal exercises over the agent's work performance is evidence that an agency relationship exists."); **Gorsich**, 893 P.2d at 1361.

4. An agency relationship can exist even where the parties "do not subjectively intend that legal consequences flow from their relation. The critical determination is whether the parties materially agreed to enter into a particular relation to which the law of agency attached." **W. Fire Truck, Inc.**, 134 P.3d at 576; *see Stortroen*, 736 P.2d at 395; **Cole**, 847 P.2d at 203 ("An agency relationship may exist absent a contract and absent acknowledgment by the parties that an agency is intended if there is evidence that the parties did materially agree to enter into a relation to which the law attaches the legal consequences of agency.").

5. Generally, an agent is entitled to indemnification from the principal for losses incurred because of the agency relationship if such

losses should fairly be borne by the principal. **Johnson Realty**, 39 P.3d at 1218.

6. In most circumstances, an agent owes a fiduciary duty to the principal. See **Digital Landscape**, 2018 COA 142, ¶ 76, 440 P.3d at 1212 (duty of loyalty to not compete with the principal concerning the agency's subject matter); **DA Mountain Rentals, LLC v. Lodge at Lionshead Phase III Condo. Ass'n**, 2016 COA 141, ¶ 43, 409 P.3d 564 (in context of homeowner's association and homeowners); **Smith v. Mehaffy**, 30 P.3d 727 (Colo. App. 2000) (in context of attorney-client relationship). For breach of fiduciary duty jury instructions, see Chapter 26.

7. "An independent contractor is not an agent if he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct." **Digital Landscape**, 2018 COA 142, ¶ 79, 440 P.3d at 1212 (quoting RESTATEMENT (SECOND) OF AGENCY § 2(3) cmt. b (1958)).



## 8:2 DISCLOSED OR UNIDENTIFIED PRINCIPAL— DEFINED

When a person knows or has notice that (he) (she) (it) is dealing with the agent of a principal and knows or has notice of who the principal is, the principal is a “disclosed principal.”

When a person knows or has notice that (he) (she) (it) is dealing with the agent of a principal, but does not know who the principal is, the principal is an “unidentified principal.”

A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.

### Notes on Use

1. Either one or both paragraphs of this instruction may be used as necessary.
2. As a result of the publication of the RESTATEMENT (THIRD) OF AGENCY, the phrase “unidentified principal” replaces the phrase “partially disclosed principal” formerly appearing in the second paragraph.
3. Whether a principal is partially or completely disclosed is a question of fact. **Water, Waste & Land, Inc. v. Lanham**, 955 P.2d 997 (Colo. 1998).

### Source and Authority

1. This instruction is supported by **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 30, 420 P.3d 223, 230 (applying RESTATEMENT (THIRD) OF AGENCY § 1.04(2) (2006), and stating principal is disclosed “if a third party has notice that the agent with whom it is interacting is acting for a principal and if the third party has notice of the principal’s identity” and is unidentified “if the third party has notice that the agent is acting for a principal but does not have notice of the principal’s identity” (citing RESTATEMENT § 1.04(2) and applying RESTATEMENT (THIRD) OF AGENCY § 1.04(4) (notice definition))). See RESTATEMENT (THIRD) OF AGENCY § 1.04(2)(a), (c) (2006) (defining disclosed and unidentified principals); RESTATEMENT (SECOND) OF AGENCY § 4 (1958) (defining disclosed, partially disclosed, and undisclosed principals); see also **Beneficial Fin. Co. v. Bach**, 665 P.2d 1034 (Colo. App. 1983) (agent is not liable on contract signed on behalf of



disclosed principal); **Bidwell v. Jolly**, 716 P.2d 481 (Colo. App. 1986) (same); **Flatiron Paving Co. v. Wilkin**, 725 P.2d 103 (Colo. App. 1986) (agent is individually liable on a contract if acting for an undisclosed principal). For historical discussion of definitions, see W. SEAVEY, AGENCY § 4 (1964).

2. An officer of a corporation is not individually liable for debts of the corporation unless the corporate principal is undisclosed. **Mountain States Commercial Collections, Inc. v. 99¢ Liquidators, Inc.**, 940 P.2d 934 (Colo. App. 1996).

3. A person who contracts with an agent acting with authority from a disclosed or partially disclosed principal (now referred to as unidentified) is liable to the principal on the contract unless the principal is excluded by the contract. **Filho v. Rodriguez**, 36 P.3d 199 (Colo. App. 2001); *see also* **Rocky Mountain Expl., Inc.**, 2018 CO 54, ¶ 33 (stating that narrow exception set forth in RESTATEMENT (THIRD) OF AGENCY § 6.11(4) for false representations made concerning undisclosed principals does not apply to unidentified principals).

### 8:3 UNDISCLOSED PRINCIPAL—DEFINED

When a person does not know or have notice that (he) (she) (it) is dealing with an agent for a principal, the principal is an “undisclosed principal.”

A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person.

#### Notes on Use

None.

#### Source and Authority

1. This instruction is supported by **Rocky Mountain Exploration, Inc. v. Davis Graham & Stubbs LLP**, 2018 CO 54, ¶ 30, 420 P.3d 223, 230 (“A principal is undisclosed if the third party has no notice that the agent is acting for a principal.” (citing RESTATEMENT (THIRD) OF AGENCY § 1.04(2) (2006) and applying RESTATEMENT (THIRD) OF AGENCY § 1.04(4) (notice definition))); and RESTATEMENT (THIRD) OF AGENCY § 1.04(2)(b) (2006) (defining undisclosed principal). *See also Mackey v. Briggs*, 16 Colo. 143, 26 P. 131 (1891); **Flatiron Paving Co. v. Wilkin**, 725 P.2d 103 (Colo. App. 1986); **Hott v. Tillotson-Lewis Constr. Co.**, 682 P.2d 1220 (Colo. App. 1983) (agent who enters into a contract for an undisclosed principal may be held personally liable on the contract); **Conner v. Steel, Inc.**, 28 Colo. App. 1, 470 P.2d 71 (1970); RESTATEMENT (SECOND) OF AGENCY § 4(3) (1958). For historical discussion of definitions, see *W. SEAVEY, AGENCY* § 4 (1964).

2. Agents routinely act on behalf of undisclosed principals, and an agent’s purchase on behalf of an undisclosed principal is a legal method of dealing with a hold-out seller. **Rocky Mountain Expl., Inc.**, 2018 CO 54, ¶¶ 31–33.

3. A third party who contracts with an agent acting with authority from an undisclosed principal is liable to the principal on the contract unless the principal is excluded by the contract, the principal’s existence is fraudulently concealed, or there is a setoff or similar defense against the agent. **Filho v. Rodriguez**, 36 P.3d 199 (Colo. App. 2001); *see also* RESTATEMENT (THIRD) OF AGENCY § 6.03 (2006) (setting forth parties to contract where agent acting with actual authority makes contract on behalf of undisclosed principal).

4. A narrow exception to the rule set forth in paragraph 3 applies where (1) the agent falsely represents to the third party that it does not

act on behalf of a principal and (2) the principal or agent had notice that the third party would not have dealt with the principal. **Rocky Mountain Expl., Inc.**, 2018 CO 54, ¶ 33 (citing RESTATEMENT (THIRD) OF AGENCY § 6.11(4) (2006)). Under these circumstances, the third party may avoid, or rescind, the contract. *Id.*

## 8:4 EMPLOYER AND EMPLOYEE—DEFINED

The terms “employer” and “employee” refer to the relationship that exists when one (person) (*insert appropriate description of entity*), the employer, employs another, the employee, to do certain work.

In determining whether the relationship exists you should consider whether (*name of alleged employer*) selected or employed (*name of alleged employee*); whether (*name of alleged employer*) was to pay (*name of alleged employee*) or paid (*name of alleged employee*) wages or other consideration; whether (*name of alleged employer*) had the power or right to dismiss and the right to control (*name of alleged employee*).

The central element is the right to control the details of performance. It does not matter whether (*name of alleged employer*) actually exercised any right to control (*name of alleged employee*) (he) (she) (it) may have had.

### Notes on Use

1. When an employee of one person has been loaned to another and the issue is whose employee that employee was at a particular time, Instructions 8:6 and 8:7 should also be given.

2. When the issue is whether the person employed is an employee or independent contractor, Instruction 8:5 should also be given.

3. These definitions of employee and employer differ from those used in the Colorado Revised Statutes. *See, e.g.*, Colorado Wage Act, §§ 8-4-101 to -123, C.R.S.; Colorado Wage Equality Regardless of Sex Act, §§ 8-5-101 to -105, C.R.S.; Workers’ Compensation Act of Colorado, §§ 8-40-101 to -302, C.R.S.; Colorado Employment Security Act, §§ 8-70-101 to -143, C.R.S.; Colorado Anti-Discrimination Act, §§ 24-34-401 to -403, C.R.S.

### Source and Authority

1. This instruction is supported by **Norton v. Gilman**, 949 P.2d 565 (Colo. 1997) (most important factor in determining whether employment relationship exists is whether alleged employer had right to control details of performance); **Moses v. Diocese of Colorado**, 863 P.2d 310, 325 (Colo. 1993) (Bishop and Diocese “had and exercised the right of



control over the manner of work performed by a priest as well as the hiring, compensation, counseling performed by the priest and discipline of the priest.”); **Jacobson v. Doan**, 136 Colo. 496, 319 P.2d 975 (1957); **Colorado Compensation Insurance Authority v. Jones**, 131 P.3d 1074 (Colo. App. 2005) (unpaid person can be an employee where there is a right to control); **Tunget v. Board of County Commissioners**, 992 P.2d 650 (Colo. App. 1999) (right to control is determinative factor in deciding whether employer-employee relationship exists); **Veintimilla v. Dobyanski**, 975 P.2d 1122 (Colo. App. 1997) (in determining whether employer-employee relationship exists, which party furnishes necessary tools is relevant); **Perkins v. Regional Transportation District**, 907 P.2d 672 (Colo. App. 1995); and **Koontz v. Rosener**, 787 P.2d 192 (Colo. App. 1989) (dismissing the lost compensation claims of employees of a licensed real estate brokerage against the majority shareholder of the brokerage because the employees’ claims lay against the brokerage as the employer). See **Mulberger v. People**, 2016 CO 10, ¶ 15, 366 P.3d 143 (using definition of employee to interpret section 16-10-103(1)(k), C.R.S. (requiring court to sustain challenge for cause where potential juror is “compensated employee of a public law enforcement agency or public defender’s office”)); RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (defining employee).

2. Because of the control the statute requires a licensed real estate broker to retain over the broker’s licensed real estate salespersons, such persons are, as a matter of law, the employees of the broker for whom they work. **Olsen v. Bondurant & Co.**, 759 P.2d 861 (Colo. App. 1988).

**8:5 INDEPENDENT CONTRACTOR—DEFINITION**

An independent contractor is (a person who) (*insert appropriate description of entity that*) contracts with another to accomplish a result using (his) (her) (its) own, rather than the other's, methods with respect to the physical conduct involved in the performance of the work, and, except as to the result of the work, is not subject to the control of the (person who) (*insert appropriate description of entity that*) engaged (him) (her) (it).

In determining whether (*alleged contractor name*) was an independent contractor or an employee, you should consider whether or not (*contracting party name*), in engaging (*alleged contractor name*), had the right to control not only the result of the work, but also the manner in which it was to be performed.

You may consider: the terms of the contract between the parties; the nature of the parties' business or occupation; which party furnished the instrumentality or tools for the work; the place of the work; the length of time of the engagement; the method of payment; the right, if any, of (*contracting party name*) to summarily discharge (*alleged contractor name*); the extent to which (*contracting party name*) exercised supervision over the work, if any; and any and all of the circumstances surrounding the relationship.

**Notes on Use**

1. The factors listed in the second and third paragraphs should be omitted where the evidence does not support including them in the instruction.
2. When this instruction is given, Instruction 8:4 should also be given.

**Source and Authority**

1. This instruction is supported by **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 78, 440 P.3d 1200 (an independent contractor engages to perform services for another utilizing his or

her own methods and free from direction and control of the employer, and is accountable only for the result to be accomplished); **Dumont v. Teets**, 128 Colo. 395, 262 P.2d 734 (1953); **Farmers' Reservoir & Irrigation Co. v. Fulton Inv. Co.**, 81 Colo. 69, 255 P. 449 (1927); **Arnold v. Lawrence**, 72 Colo. 528, 213 P. 129 (1923); **Dana's Housekeeping v. Butterfield**, 807 P.2d 1218 (Colo. App. 1990); RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). *See also* **Brush Hay & Mill Co. v. Small**, 154 Colo. 11, 388 P.2d 84 (1963); RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (2006) (defining employee).

2. The key fact in determining whether a person engaged to do work for another is an independent contractor or an employee depends on the control over the work to be done. If the power to control, whether exercised or not, includes controlling the details of how the work will be done, that is, the "means as well as the end," then the person engaged is an employee. **Perkins v. Reg'l Transp. Dist.**, 907 P.2d 672, 675 (Colo. App. 1995) ("control over the means and methods of accomplishing the contracted-for result is inconsistent with 'independent contractor' status"). On the other hand, if the person engaged has the right to control the manner in which the work will be done and is subject to the control of the other essentially only in terms of being responsible for a certain end product or result, then the person engaged is an independent contractor. **Dumont**, 128 Colo. at 397, 262 P.2d at 735; **Farmers' Reservoir & Irrigation Co.**, 81 Colo. at 71-72, 255 P. at 449-50; **Dana's Housekeeping**, 807 P.2d at 1220 (while no one factor is determinative as to whether a person is an employee as opposed to an independent contractor, the most important factor to consider is the right to control, not the fact of control); RESTATEMENT (SECOND) OF AGENCY § 2 (1958) (defining master, servant, and independent contractor); *see also* RESTATEMENT (THIRD) OF AGENCY §§ 1.01 cmt. c & 7.07(3) (2006).

3. The factors for determining the nature of the relationship listed in the third paragraph are based on RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). *See also* **Arnold**, 72 Colo. at 530, 213 P. at 130.

4. An employer is generally not liable for the torts of a non-agent independent contractor, except in limited circumstances. *See* **Springer v. City & Cty. of Denver**, 13 P.3d 794 (Colo. 2000) (nondelegable duty under Premises Liability Act); **Huddleston v. Union Rural Elec. Ass'n**, 841 P.2d 282 (Colo. 1992) (inherently dangerous activities); **Garden of the Gods Vill., Inc. v. Hellman**, 133 Colo. 286, 294 P.2d 597 (1956) (ultrahazardous activities).

5. An employer may also be liable for negligence if it fails to follow the recommendations of its independent contractors. **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010).

6. One may be personally liable for negligence for failing to use due care when selecting an independent contractor. **W. Stock Ctr., Inc. v. Sevitt, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

7. An independent contractor may also be an agent, and the person



engaging such agent may be held vicariously liable for torts committed by the agent within the scope of the agency. **Cheney v. Hailey**, 686 P.2d 808 (Colo. App. 1984) (“Because an agency relationship existed, [the principal] was vicariously liable whether or not [the agent] was in fact an independent contractor.”); see RESTATEMENT (SECOND) OF AGENCY § 14N (1958). “An independent contractor is not an agent if ‘he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.’” **Digital Landscape**, 2018 COA 142, ¶ 79, 440 P.3d at 1212 (quoting RESTATEMENT (SECOND) OF AGENCY § 2(3) cmt. b (1958)).



## 8:6 LOANED EMPLOYEE

When an employee is loaned out by (his) (her) (its) employer to another person for some special service or project and the other person has the exclusive right to control the employee, the employee becomes the employee of that other person.

### Notes on Use

1. This instruction is to be used in appropriate cases as an introductory instruction to Instruction 8:7.
2. When necessary, Instruction 8:4 (defining employer and employee) should be given with this instruction.
3. When appropriate to the evidence, a more suitable word, for example, "corporation," may be substituted for the word "person."

### Source and Authority

This instruction is supported by **Bernardi v. Community Hospital Ass'n**, 166 Colo. 280, 443 P.2d 708 (1968); **Chartier v. Winslow Crane Service Co.**, 142 Colo. 294, 350 P.2d 1044 (1960); **Landis v. McGowan**, 114 Colo. 355, 165 P.2d 180 (1946); **Thayer v. Kirchhof**, 83 Colo. 480, 266 P. 225 (1928); and **Settle v. Basinger**, 2013 COA 18, ¶ 33, 411 P.3d 717. *See also* **Kiefer Concrete, Inc. v. Hoffman**, 193 Colo. 15, 562 P.2d 745 (1977); **Jacobson v. Doan**, 136 Colo. 496, 319 P.2d 975 (1957); **Morphew v. Ridge Crane Serv.**, 902 P.2d 848 (Colo. App. 1995); **Colwell v. Oatman**, 32 Colo. App. 171, 510 P.2d 464 (1973); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (addressing "lent employees" or "borrowed servants"); RESTATEMENT (SECOND) OF AGENCY § 227 (1958).

**8:7 LOANED EMPLOYEE—DETERMINATION**

**If you find that** *(name of general employer)* **loaned out** *(name of employee)* **to** *(name of alleged special employer)* **for a special service or project and that** *(name of alleged special employer)* **had the exclusive right to control** *(name of employee)* **with respect to that (work) (service) (job), then you must find that** *(name of employee)* **was the employee of** *(name of alleged special employer)*.

**If you find that** *(name of general employer)* **did not loan out** *(name of employee)* **to** *(name of alleged special employer)* **for a special service or project or if** *(name of alleged special employer)* **did not have the exclusive right to control** *(name of employee)*, **then you must find that** *(name of employee)* **was not the employee of** *(name of alleged special employer)*.

**Notes on Use**

1. In appropriate cases, Instruction 8:6 should be given as an introduction to this instruction.
2. When necessary, Instruction 8:4 (defining employer and employee) should be given with this instruction.
3. In the first paragraph, use whichever word, “work,” “service,” or “job,” is most appropriate.

**Source and Authority**

1. This instruction is supported by **Kiefer Concrete, Inc. v. Hoffman**, 193 Colo. 15, 562 P.2d 745 (1977); **Bernardi v. Community Hospital Ass’n**, 166 Colo. 280, 443 P.2d 708 (1968); **Chartier v. Winslow Crane Service Co.**, 142 Colo. 294, 350 P.2d 1044 (1960); **Jacobson v. Doan**, 136 Colo. 496, 319 P.2d 975 (1957); **Landis v. McGowan**, 114 Colo. 355, 165 P.2d 180 (1946); **Thayer v. Kirchhof**, 83 Colo. 480, 266 P. 225 (1928); and **Settle v. Basinger**, 2013 COA 18, ¶ 33, 411 P.3d 717. *See also* **Morphew v. Ridge Crane Serv.**, 902 P.2d 848 (Colo. App. 1995); **Colwell v. Oatman**, 32 Colo. App. 171, 510 P.2d 464 (1973); RESTATEMENT (THIRD) OF AGENCY § 7.03 cmt. d(2) (2006) (addressing “lent employees” or “borrowed servants”). Control was found to exist in some, but not all, of the above cases.

2. “Courts have traditionally considered several criteria to be relevant in the determination whether a loaned employment relationship exists. These include: (1) whether the borrowing employer has the right

to control the employee's conduct; (2) whether the employee is performing the employer's work; (3) whether there was an agreement between the original and borrowing employer; (4) whether the employee had acquiesced in the arrangement; (5) whether the borrowing employer had the right to terminate the employee; (6) whether the borrowing employer furnished the tools and place for performance; (7) whether the new employment was to be for a considerable length of time; (8) whether the borrowing employer had the obligation to pay the employee; and (9) whether the original employer terminated its relationship with the employee." **Morphew**, 902 P.2d at 850.

3. "The element of control necessary to establish a borrowed employment relationship need not extend to directing the technical details of a skilled employee's activity. What is essential is the right to control the time and place of services, the person for whom rendered, and the degree and amount of services." *Id.* at 851.

4. An employer's liability for a loaned employee depends on the claim asserted. See **Kiefer Concrete, Inc.**, 193 Colo. at 18, 562 P.2d at 746 ("The employer under whose exclusive control the loaned employee operates may then be held vicariously liable for the acts of the employee under ordinary principles of Respondeat superior."); **Morphew**, 902 P.2d at 850 (holding, in workers' compensation claim, that because a loaned employee is considered a co-employee of the employer's employees, both the loaned employee and the general employer are immune from tort liability where the conditions of loaned employment are met).



## 8:8 SCOPE OF EMPLOYMENT OF EMPLOYEE— DEFINED

An employee is acting within the scope of (his) (her) (its) employment when the employee is doing work that is:

1. Assigned by (his) (her) (its) employer; or
2. Proper, usual, and necessary to accomplish the assigned work; or
3. Customary in the particular trade or business to accomplish the assigned work.

### Notes on Use

This instruction is to be used in tort cases in which the plaintiff is seeking to hold the defendant liable as an employer under the doctrine of respondeat superior. *See* Instruction 8:18.

### Source and Authority

1. This instruction is supported by **Lytle v. Kite**, 728 P.2d 305 (Colo. 1986); **Hynes v. Donaldson**, 155 Colo. 456, 395 P.2d 221 (1964); and **Cooley v. Eskridge**, 125 Colo. 102, 241 P.2d 851 (1952). *See also* **Moses v. Diocese of Colo.** 863 P.2d 310 (Colo. 1993) (clergyman was acting outside scope of his employment when he engaged in sex with parishioner); **Connes v. Molalla Transp. Sys., Inc.**, 831 P.2d 1316 (Colo. 1992) (intentional tort against customer outside scope of employment); **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988); **Spencer v. United Mortg. Co.**, 857 P.2d 1342 (Colo. App. 1993) (theft by employee outside scope of employment); **Goettman v. North Fork Valley Rest**, 176 P.3d 60, 70 (Colo. 2007) (“a traveling employee need not be engaged in the actual performance of work to be considered engaged in the course of his employment”). *See* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) (defining when employee acts outside of scope).

2. In determining whether a negligent act or omission of an employee was within the scope of his or her employment, the test is whether the act or omission was done in furtherance of the employer’s business and not whether the manner of performance was authorized by the employer. **Pham v. OSP Consultants, Inc.**, 992 P.2d 657 (Colo. App. 1999) (employee on out-of-town work assignment was not acting within scope of employment when involved in automobile collision after leaving bar, where purpose of trip to bar was personal entertainment).

3. “The question of whether an employee is acting within the scope



of the employment is a question of fact.” **Raleigh v. Performance Plumbing & Heating**, 130 P.3d 1011, 1019 (Colo. 2006).

4. The “going-and-coming rule” defines the scope of the employment relationship when the employee was commuting between work and home or another personal destination at the time of the plaintiff’s injury. **Suydam v. LFI Fort Pierce, Inc.**, 2020 COA 144M, ¶¶ 17, 26 (approving this instruction). Colorado’s version of that rule provides that “an employee traveling from . . . work to his home or another personal destination, after completing his day’s work, cannot ordinarily be regarded as acting in the scope of his employment so as to charge the employer for the employee’s negligence in the operation of the [employee’s] car.” *Id.* at ¶ 18 (quoting **Beeson v. Kelran Constructors, Inc.**, 43 Colo. App. 505, 507, 608 P.2d 369, 371 (1979)). The rule has several exceptions. These include when the employee was engaged in an act connected to his work or was furthering the employer’s interests at the time of the conduct that caused the injury. *Id.* at ¶ 19; *see also Stokes v. Denver Newspaper Agency, LLP*, 159 P.3d 691, 693 (Colo. App. 2006).

## 8:9 SCOPE OF AUTHORITY OF AGENT—DEFINED

An agent is acting within the scope of (his) (her) (its) authority when the agent is carrying (on business) (out a business transaction) for (his) (her) (its) principal which the principal has expressly authorized or which is within the (incidental) (or) (implied) (or) (apparent) authority of the agent.

### Notes on Use

1. Use whichever parenthesized words and phrases are appropriate.
2. For the definitions of “incidental,” “implied,” and “apparent” authority, see Instructions 8:10, 8:11, and 8:12, respectively.
3. This instruction is for use in contract cases involving a principal and agent (rather than an employer and employee). When the plaintiff is seeking to hold a defendant-employer liable in tort under the doctrine of respondeat superior, Instruction 8:8 should be used.

### Source and Authority

1. This instruction is supported by **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); **Independence Indemnity Co. v. International Trust Co.**, 96 Colo. 92, 39 P.2d 780 (1934); **Montoya v. Grease Monkey Holding Corp.**, 883 P.2d 486 (Colo. App. 1994), *aff’d on other grounds sub nom. Grease Monkey Int’l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); and **Savage v. Pelton**, 1 Colo. App. 148, 27 P. 948 (1891). For additional cases, see the Source and Authority to Instruction 8:18. For historical discussion of these principles, see H. REUSCHLEIN & W. GREGORY, AGENCY AND PARTNERSHIP §§ 14, 15 (1979); W. SEAVEY, AGENCY § 8 (1964).

2. The scope of an agent’s authority depends upon the intent of the parties, and may be general or specific, involving a broad or narrow delegation of authority from principal to agent. **Fey Concert Co. v. City & Cty. of Denver**, 940 P.2d 972 (Colo. App. 1996), *rev’d on other grounds*, 960 P.2d 657 (Colo. 1998). An attorney does not have the authority to settle a case without his client’s knowledge and consent. **Siener v. Zeff**, 194 P.3d 467 (Colo. App. 2008).

3. Under Colorado law, the use and interpretation of a “power of attorney,” by which a principal confers express authority on an agent, is governed by sections 15-14-500.3 to -509, C.R.S. See **In re Trust of Franzen**, 955 P.2d 1018 (Colo. 1998); see also §§ 15-14-503 to -509, C.R.S. (Colorado Patient Autonomy Act); §§ 15-18.5-101 to -105, C.R.S. (health care proxy); §§ 15-18-101 to -112, C.R.S. (Colorado Medical Treatment Decision Act); **Moffett v. Life Care Ctrs. of Am.**, 219 P.3d 1068 (Colo. 2009) (agent has authority to enter into arbitration agree-

ment as a part of nursing home admission process under written medical durable power of attorney); **Lujan v. Life Care Ctrs. of Am.**, 222 P.3d 970 (Colo. App. 2009) (power of person acting as health proxy does not include authority to agree to arbitration because that is not a “medical treatment” decision).

4. An agent may invoke a jury waiver provision in the principal’s contract with a third party. **Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9 (Colo. App. 2010).

5. Agency principles may not apply where an agent has independent authority to take action. **In re Estate of Sandstead**, 2016 COA 49, ¶¶ 38-39, 412 P.3d 799, *rev’d on other grounds sub nom. Sandstead-Corona v. Sandstead*, 2018 CO 26, 415 P.3d 310.

**8:9A ACTUAL AUTHORITY**

An agent acts with actual authority when, at the time of taking action that affects the principal, the agent reasonably believes (his) (her) (its) actions are consistent with the way the principal wishes the agent to act. In determining whether the agent's belief is reasonable, you should consider the principal's words (and) (or) conduct directed to the agent.

**Notes on Use**

1. The rule of actual authority should not be confused with the rules governing express and implied authority. *See* Instructions 8:9B and 8:11.
2. When applicable, this instruction should be used with Instructions 8:9B, 8:10, and 8:11.

**Source and Authority**

This instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 21, 396 P.3d 651 (citing RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006)); and **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994) (holding actual authority incorporates concepts of both express and implied authority).



**8:9B EXPRESS AUTHORITY**

**An agent acts with express authority when the principal directly states that the agent may perform a particular act on the principal's behalf.**

**Notes on Use**

The rule of express authority should not be confused with the rules governing actual authority. *See* Instruction 8:9A.

**Source and Authority**

This instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 21, 396 P.3d 651; and **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994).

**8:10 INCIDENTAL AUTHORITY—DEFINED**

In addition to any express authority given by a principal to an agent, an agent has the incidental authority to do those acts that usually accompany, or are reasonably necessary to accomplish, the express authority.

**Notes on Use**

1. When applicable, this instruction should be used with Instructions 8:9 and 8:11.

2. An agent's incidental authority may be limited or excluded by his or her principal. RESTATEMENT (SECOND) OF AGENCY § 35 (1958). A principal may nonetheless be bound under the doctrine of apparent authority. *See Indep. Indem. Co. v. Int'l Tr. Co.*, 96 Colo. 92, 39 P.2d 780 (1934); Instruction 8:12. When there is sufficient evidence of such limitation or exclusion, this instruction, and, if applicable, Instruction 8:12, should be appropriately modified. *See* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. g (2006) (stating that a "principal may direct an agent to do or refrain from doing a specific act").

**Source and Authority**

1. This instruction is supported by RESTATEMENT (SECOND) OF AGENCY § 35 (1958). *See also State Farm Mut. Auto. Ins. Co v. Johnson*, 2017 CO 68, ¶ 22, 396 P.3d 651; *Willey v. Mayer*, 876 P.2d 1260 (Colo. 1994); *Indep. Indem. Co.*, 96 Colo. at 102, 39 P.2d at 784; *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486 (Colo. App. 1994), *aff'd on other grounds sub nom. Grease Monkey Int'l, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); *Dyer v. Johnson*, 757 P.2d 178 (Colo. App. 1988); *Savage v. Pelton*, 1 Colo. App. 148, 27 P. 948 (1891); and RESTATEMENT (THIRD) OF AGENCY § 2.02(1) & cmt. d (2006) (stating that agent has authority to take action "implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act," and comment further clarifying the circumstances under which an agent may be granted incidental authority to accomplish the principal's objectives).

2. The Third Restatement provides that an agent's interpretation of the principal's manifestations must be reasonable. RESTATEMENT (THIRD) OF AGENCY § 2.02(2), (3) (2006).

## 8:11 IMPLIED AUTHORITY—DEFINED

In addition to any express authority given by a principal to an agent, an agent has implied authority to take actions:

(1. On behalf of his or her principal that are usual and customary practices in the trade or business involved, if the principal knew or should have known of such practices;) (and)

(2. That the agent had taken before on behalf of (his) (her) (its) principal that the principal knew of and by (his) (her) (its) conduct or lack of conduct impliedly approved.)

### Notes on Use

1. When applicable, Instruction 8:10 (defining incidental authority) should be used with this instruction.

2. Use whichever parenthesized portions of this instruction are appropriate.

3. An agent's implied authority may be limited or excluded by his or her principal. RESTATEMENT (SECOND) OF AGENCY § 36 (1958); *see also* RESTATEMENT (THIRD) OF AGENCY § 2.02 cmt. g (2006) ("A principal may direct an agent to do or refrain from doing a specific act."). A principal may nonetheless be bound under the doctrine of apparent authority. *See Indep. Indem. Co. v. Int'l Tr. Co.*, 96 Colo. 92, 39 P.2d 780 (1934); Instruction 8:12. When there is sufficient evidence of such limitation or exclusion, this instruction and, if applicable, Instruction 8:12 should be appropriately modified.

### Source and Authority

1. The first numbered paragraph of this instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 22, 396 P.3d 651 (citing RESTATEMENT (THIRD) OF AGENCY § 2.01 cmt. b); **Willey v. Mayer**, 876 P.2d 1260 (Colo. 1994); **Dyer v. Johnson**, 757 P.2d 178 (Colo. App. 1988); **Montoya v. Grease Monkey Holding Corp.**, 883 P.2d 486 (Colo. App. 1994), *aff'd on other grounds sub nom. Grease Monkey International, Inc. v. Montoya*, 904 P.2d 468 (Colo. 1995); and **Gates Iron Works v. Denver Engineering Works Co.**, 17 Colo. App. 15, 67 P. 173 (1901). *See also Russell v. First Am. Mortg. Co.*, 39 Colo. App. 360, 565 P.2d 972 (1977); **Savage v. Pelton**, 1 Colo. App. 148, 27 P. 948 (1891); RESTATEMENT (THIRD) OF AGENCY § 2.02(1)

(2006) (stating that agent has “actual authority to take action designated or implied in the principal’s manifestations”); RESTATEMENT (SECOND) OF AGENCY § 36 (1958).

2. The second numbered paragraph of this instruction is supported by **Moore v. Switzer**, 78 Colo. 63, 65, 239 P. 874, 875 (1925), in which the court stated:

Implied authority of an agent is actual authority evidenced by conduct, that is, the conduct of the principal has been such as to justify the jury in finding that the agent had actual authority to do what he did. This may be proved by evidence of acquiescence with knowledge of the agent’s acts, and such knowledge and acquiescence may be shown by evidence of the agent’s course of dealing for so long a time that knowledge and acquiescence may be presumed. Knowledge of this course of conduct by one dealing with the agent is irrelevant, but knowledge thereof by the principal is, not only relevant, but essential, and must be proved either directly or indirectly as above.

*See also* **Citywide Banks v. Armijo**, 313 P.3d 647 (Colo. App. 2011).

3. “Implied authority” has also been defined as the authority to do “those acts which are incidental to, or are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent.” **Willey**, 876 P.2d at 1264; *see* **Johnson**, 2017 CO 68, ¶ 22; **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357 (Colo. App. 2007); *see also* Instruction 8:10.

4. A co-named insured on automobile insurance policy has implied authority to waive UM/UIM benefits as result of express authority to purchase insurance policy on behalf of co-named insured. **Johnson**, 2017 CO 68, ¶¶ 22-24.

5. The Third Restatement provides that an agent’s interpretation of the principal’s manifestations must be reasonable. RESTATEMENT (THIRD) OF AGENCY § 2.02(2), (3) (2006).



## 8:12 APPARENT AUTHORITY (AGENCY BY ESTOPPEL)—DEFINITION AND EFFECT

An agent has apparent authority when a principal, by words or conduct, has caused another person to reasonably believe that the principal has authorized an agent to act on the principal's behalf, even though the principal may not have done so. When an agent has apparent authority, it is the same as if the principal had authorized the agent's actions.

### Notes on Use

1. This instruction should not be used when the principal is undisclosed because by definition, apparent authority cannot exist when the principal is undisclosed. Such may not be true when the principal is unidentified, as in the case of a partnership where the third person is dealing with the partnership and knows some of its members but not all of them. For historical discussion of this principle, see W. SEAVEY, AGENCY § 4 (1964).

2. The rule of apparent authority should not be confused with the rules governing incidental or implied authority. See Instructions 8:10 and 8:11.

### Source and Authority

1. This instruction is supported by **State Farm Mutual Automobile Insurance Co. v. Johnson**, 2017 CO 68, ¶ 20, 396 P.3d 651, 656 ("An agent has apparent authority to affect a principal's relations with a third party when the third party reasonably believes, based on the principal's manifestations, that the agent has authority to act on behalf of the principal." (citing RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006))). See also **Bowser v. Union Bag Co.**, 112 Colo. 373, 149 P.2d 800 (1944); **Wilson v. Mosko**, 110 Colo. 127, 130 P.2d 927 (1942); **Burck v. Hubbard**, 104 Colo. 83, 88 P.2d 955 (1939); **Zeller v. Taylor**, 95 Colo. 503, 37 P.2d 391 (1934) (by implication); **Rush Creek Sols., Inc. v. Ute Mountain Ute Tribe**, 107 P.3d 402 (Colo. App. 2004); **In re Marriage of Robbins**, 8 P.3d 625 (Colo. App. 2000); **Kuehn v. Kuehn**, 642 P.2d 524 (Colo. App. 1981); **Russell v. First Am. Mortg. Co.**, 39 Colo. App. 360, 565 P.2d 972 (1977); RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006) (defining apparent authority).

2. For a general historical discussion of apparent authority and the typical situations in which it may exist, see W. SEAVEY, AGENCY § 8, at 13-14 (1964); P. MECHEM, OUTLINES OF THE LAW OF AGENCY §§ 84-95 (4th ed. 1952).

3. For the distinction between apparent and implied authority, see

**Johnson**, 2017 CO 68, ¶¶ 20-22; **Moore v. Switzer**, 78 Colo. 63, 239 P. 874 (1925); and **Sigel-Campion Live Stock Comm'n Co. v. Ardohain**, 71 Colo. 410, 207 P. 82 (1922) (awareness of, and reliance on, a “holding out” by the principal required for apparent authority).

4. Where a third party has dealt with an agent and has established the existence of apparent authority, it is incumbent upon the principal who seeks to escape liability for the agent’s actions to show that the third party had knowledge or was charged with notice that the agent was acting beyond the scope of the agent’s authority. **Bowser**, 112 Colo. at 379-80, 149 P.2d at 803; **Zambruk v. Perlmutter 3rd Generation Builders, Inc.**, 32 Colo. App. 276, 510 P.2d 472 (1973); *see also* **White v. Brock**, 41 Colo. App. 156, 584 P.2d 1224 (1978).

5. The RESTATEMENT (SECOND) OF TORTS section 261 (1965), articulates the specific situation where liability will attach to the principal under the apparent authority doctrine for the intentional torts of the agent. **Grease Monkey International, Inc. v. Montoya**, 904 P.2d 468 (Colo. 1995) (Grease Monkey liable for the fraudulent acts of its Chief Operating Officer because the COO was put in a position that enabled him to commit fraud, he acted within his apparent authority, and he committed fraud).

6. “Apparent authority thus flows only from the acts and conduct of the principal.” **Johnson**, 2017 CO 68, ¶ 20 (citation omitted).

7. Colorado courts have used the terms “ostensible agency,” “apparent agency,” “apparent authority,” and “agency by estoppel” interchangeably. **Carl’s Italian Rest. v. Truck Ins. Exch.**, 183 P.3d 636 (Colo. App. 2007); **Daly v. Aspen Ctr. for Women’s Health, Inc.**, 134 P.3d 450 (Colo. App. 2005).

## 8:13 SCOPE OF AUTHORITY OR EMPLOYMENT— DEPARTURE

An agent is acting outside the scope of (his) (her) (its) (authority) (employment) when the agent substantially departs from (his) (her) (its) principal's business by doing an act intended to accomplish an independent purpose of the agent's own or for some other purpose which is unrelated to the business of the principal and not reasonably included within the scope of the agent's (authority) (employment). Such departure may be of short duration, but during such time the agent is not acting within the scope of (his) (her) (its) (authority) (employment).

### Notes on Use

1. Use whichever parenthesized word, "authority" or "employment," is more appropriate.
2. When more appropriate, substitute the word "employee" for "agent" and the word "employer" for "principal."
3. When appropriate, this instruction should be given with Instruction 8:8 or 8:9.

### Source and Authority

1. This instruction is based on **Kirkpatrick v. McCarty**, 112 Colo. 588, 152 P.2d 994 (1944); and **Marron v. Helmecke**, 100 Colo. 364, 67 P.2d 1034 (1937). For additional cases, see the Source and Authority to Instruction 8:18. *See also* RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) (defining when act is within or outside scope of authority); RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958).
2. An employee who is lodging in a public accommodation, preparing to eat, or going to or returning from a meal is performing an act necessarily incident to his or her employment. **Hynes v. Donaldson**, 155 Colo. 456, 395 P.2d 221 (1964).
3. As to when a departure may not be substantial, see **Gibson v. Dupree**, 26 Colo. App. 324, 144 P. 1133 (1914).



**8:14 RATIFICATION—DEFINITION AND EFFECT**

A person may act as the agent for another without authority. If the person for whom the act was done has full knowledge of all the important facts, that person may, by words or conduct, ratify or accept the action after it was done. Ratification after the action is the same as authorization before the action.

**Notes on Use**

Where a person expressly ratifies an act under circumstances that make it appear that person is assuming the risk of any lack of complete knowledge, such ratification may still be effective even though the person lacks full knowledge. **W. Inv. & Land Co. v. First Nat'l Bank**, 64 Colo. 37, 172 P. 6 (1918). In such circumstances, this instruction should be appropriately modified.

**Source and Authority**

1. This instruction is supported by **Nunnally v. Hilderman**, 150 Colo. 363, 373 P.2d 940 (1962); **Fiscus v. Liberty Mortgage Corp.**, 2014 COA 79, ¶ 40, 373 P.3d 644, *aff'd on other grounds*, 2016 CO 31, 379 P.3d 278; **Siener v. Zeff**, 194 P.3d 467 (Colo. App. 2008); **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); **Hauser v. Rose Health Care Systems**, 857 P.2d 524 (Colo. App. 1993); and **M.S.P. Industries, Inc. v. Diversified Mortgage Services, Inc.**, 777 P.2d 237 (Colo. App. 1989) (discusses both requirements and effect of a ratification).

2. The legal effect of a ratification as set out in the last sentence of this instruction is supported by **Poudre Valley Furniture Co. v. Crow**, 80 Colo. 353, 251 P. 543 (1926). *See also Philips Indus., Inc. v. Mathews, Inc.*, 711 P.2d 704, 706 (Colo. App. 1985) (the legal effect of ratification of unauthorized sale by agent includes "the agent's entitlement to its usual commissions, fees, and expenses").

3. A failure to act to repudiate an agent's act may constitute ratification. **Siener**, 194 P.3d at 472 (acceptance of benefits, failure to repudiate, knowledge of circumstances all factors to consider in determining whether client whose attorney makes an unauthorized settlement has ratified it).

4. The burden of proving ratification with full knowledge of all material facts is on the party alleging ratification occurred. **Fiscus**, 2014 COA 79, ¶ 40; **Siener**, 194 P.3d at 472.



## 8:15 KNOWLEDGE OF AGENT IMPUTABLE TO PRINCIPAL

A principal is considered to know or have notice of information if the principal's agent, while acting within the scope of the agent's authority, learns or receives notice of the information.

### Notes on Use

In certain cases, knowledge acquired by an agent prior to becoming an agent may also be imputable to the agent's principal. See **Schollay v. Moffitt-West Drug Co.**, 17 Colo. App. 126, 67 P. 182, 184 (1901). In such cases this instruction should be appropriately modified.

### Source and Authority

1. This instruction is supported by **Filatov v. Turnage**, 2019 COA 120, ¶ 21, 451 P.3d 1263, 1268 ("Notice to an agent is notice to the principal."); **Gray v. Blake**, 131 Colo. 560, 283 P.2d 1078 (1955); and **Denver, S. P. & P. R.R. v. Conway**, 8 Colo. 1, 5 P. 142 (1884). See also **Hauser v. Rose Health Care Sys.**, 857 P.2d 524 (Colo. App. 1993); RESTATEMENT (THIRD) OF AGENCY, § 5.02 (2006).

2. When an agent acts adversely to the interests of its principal, there is an exception to the general rule that the knowledge of an agent is imputable to its principal. **Vail Nat'l Bank v. Finkelman**, 800 P.2d 1342 (Colo. App. 1990).

3. Generally, knowledge of, or notice to, a general partner of a limited partnership is imputable to the limited partners if such knowledge or notice concerns partnership business and was received or acquired by the general partner while transacting partnership business. **BMS P'ship v. Winter Park Devil's Thumb Inv. Co.**, 910 P.2d 61 (Colo. App. 1995), *aff'd on other grounds*, 926 P.2d 1253 (Colo. 1996). Also, the knowledge of a partner concerning general partnership business is imputable to all of the partners. **Zimmerman v. Dan Kamphausen Co.**, 971 P.2d 236 (Colo. App. 1998).

4. Imputed knowledge is different from actual knowledge. Actual knowledge requires an active or conscious belief or awareness. **Jehly v. Brown**, 2014 COA 39, ¶¶ 12-13, 327 P.3d 351; see also **Clown's Den, Inc. v. Canjar**, 33 Colo. App. 212, 518 P.2d 957 (1973) (differentiating between actual and imputed knowledge of principal).

## 8:16 TERMINATION OF AGENT'S AUTHORITY

**The authority of an agent to represent (his) (her) (its) principal is terminated** (*insert the appropriate terminating event, e.g., "upon the death of the principal"*). **The party claiming the authority of an agent was terminated has the burden of proving it.**

### Notes on Use

1. In certain cases, for example, the termination by a principal of the authority of a general agent may not be effective as against third persons unless they have been given notice. *See* Instruction 8:17.

2. This instruction is not applicable to agencies "coupled with an interest."

### Source and Authority

1. This instruction is supported by **Stortroen v. Beneficial Finance Co.**, 736 P.2d 391 (Colo. 1987) (partial list of grounds for termination) (citing RESTATEMENT (SECOND) OF AGENCY §§ 105-07, 117-19); **Lowell v. Hessey**, 46 Colo. 517, 105 P. 870 (1909) (principal's revocation of agency authority terminates only upon notice to the agent); and **Boettcher DTC Building Joint Venture v. Falcon Ventures**, 762 P.2d 788 (Colo. App. 1988) (agency terminates upon completion of the assigned task). *See* RESTATEMENT (THIRD) OF AGENCY §§ 3.06 (termination of actual authority), 3.07 (death, cessation of existence, and suspension of powers), 3.08 (loss of capacity), 3.09 (termination by agreement or changed circumstances), 3.10 (manifestation terminating actual authority), 3.11 (termination of apparent authority) (2006).

2. The burden of establishing a termination rests on the party who asserts it. **Paulsen v. Rourke**, 26 Colo. App. 488, 145 P. 711 (1915) (termination by revocation).

3. For a discussion of the irrevocability of an agency coupled with an interest, see **In re Estate of Gray**, 37 Colo. App. 47, 541 P.2d 336 (1975).

4. For the effect of the death or incompetency of a bank customer on the authority of a payor or collecting bank, see section 4-4-405, C.R.S.

5. As to the appointment and termination of the authority of an insurance agent, that is, an "insurance provider," see sections 10-2-416 and 10-2-416.5, C.R.S.

## 8:17 TERMINATION OF AGENT'S AUTHORITY— NOTICE TO THIRD PARTIES

Where (*name of third party*) (had previously dealt with an agent of a known principal [*name*]) (knew [*name of agent*] to be the principal [*name of principal's agent*]) (was likely to deal with [*name of agent*] on the basis of [his] [her] [its] knowledge that [*name of agent*] was an agent of the principal [*name*]), (*name of third person*) had a right to assume the agent's authority would continue until (he) (she) knew or was notified of the principal's termination of the agent's authority.

No particular form of notice of termination is required. Notice is sufficient if it provides information that would cause a reasonable person to investigate the possible termination of the agent's authority.

### Notes on Use

1. The rule set out in this instruction is generally applicable only in the case of a general, as opposed to a special, agent. Only in rare instances does a special agent's authority continue after termination without notice.

2. A principal's termination of an agent's authority does not revoke an agent's apparent authority. The agent's apparent authority arises from the principal's manifestation of the agent's authority to deal with third parties. The right of third parties to deal with an agent based on the agent's apparent authority remains unaffected until the third parties have knowledge or have been notified that the agent's authority has been terminated. The specific notice required depends upon the facts.

3. Use whichever parenthesized clauses are appropriate to the facts of the case.

4. If there is a dispute as to any of the facts contained in the parenthetical clauses, this instruction should be phrased conditionally, e.g., "If (*name of third person*) (had previously dealt with an agent of a known principal) (knew [*name of agent*] to be [*name of alleged principal's agent*], and [*name of agent*] in fact had been [*name of alleged principal's agent*])," etc.

### Source and Authority

1. This instruction is supported by **West Denver Feed Co. v.**



**Ireland**, 38 Colo. App. 64, 551 P.2d 1091 (1976); and RESTATEMENT (SECOND) OF AGENCY §§ 127-133, 135-136 (1958). For historical discussion of these principles, see **W. SEAVEY**, AGENCY §§ 51-53 (1964); *see also* RESTATEMENT (THIRD) OF AGENCY §§ 2.01 cmt. c, 3.11 (2006).

2. There is sufficient notice of termination of the agency where a creditor learns, actually or constructively, that the former principal has ceased to do business or transferred the enterprise to another. **W. Denver Feed Co.**, 38 Colo. App. at 67, 551 P.2d at 1093-94.

3. As to the appointment and termination of the authority of an insurance agent, that is, an "insurance provider," see sections 10-2-416 and 10-2-416.5, C.R.S.



## B. LIABILITY ARISING FROM AGENCY

### Introductory Note

1. Divisions of the court of appeals disagree as to whether a principal is liable for physical injuries caused by agent independent contractors. Compare **Daly v. Aspen Ctr. for Women's Health, Inc.**, 134 P.3d 450, 454 (Colo. App. 2005) (holding that "[o]rdinarily, a principal is not liable for physical injuries caused by the negligence of a nonservant agent" (citing Restatement (Second) of Agency § 250 (1958))), with **Cheney v. Hailey**, 686 P.2d 808 (Colo. App. 1984) (holding that a principal was vicariously liable for injuries caused by an agent's negligent driving, without regard to agent's independent contractor status).

2. The supreme court has not squarely addressed the issue. In **Grease Monkey International, Inc. v. Montoya**, 904 P.2d 468, 473 (Colo. 1995), the court noted in dicta that "[w]hen the servant or agent uses the apparent authority of the relationship with the master or principal, the Restatement (Second) of Agency also holds principals vicariously liable for the physical torts of agents who are not servants, i.e., if the tort was committed within the scope of the agency." The court also explained that employees and independent contractor agents are distinguishable partly because an employer, unlike an independent contractor agent, is liable for physical harm resulting from an employee's physical conduct in the scope of employment. *Id.* In light of the unsettled nature of Colorado law, the Committee takes no position on the issue.

**8:18 PRINCIPAL AND AGENT—BOTH PARTIES  
SUED—ISSUE AS TO RELATIONSHIP  
AND/OR SCOPE OF AUTHORITY**

**For the plaintiff, (*name*), to recover on (his) (her) (its) claim(s) of (*insert applicable theory of liability, e.g., “breach of fiduciary duty”*) against the defendant, (*alleged principal’s name*), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (*insert applicable theory of liability, e.g., “breach of fiduciary duty”*) claim(s) against the defendant, (*alleged agent’s name*);**

**(2. The defendant, [*alleged agent’s name*], was the agent of the defendant, [*alleged principal’s name*], at the time of the [*insert applicable theory of liability, e.g., “breach of fiduciary duty”*] [*;* and])**

**(3. The defendant, [*alleged agent’s name*], was acting within the scope of [his] [her] [its] authority at the time of the [*insert appropriate description of events, e.g., “occurrence,” “promise was made,” “representation was made,” etc.*].)**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant, (*alleged principal’s name*), on the claim(s) of (*insert applicable theory of liability, e.g., “breach of fiduciary duty”*).**

**On the other hand, if you find that all of these (*number*) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (*insert applicable theory of liability, e.g., “breach of fiduciary duty”*), against the defendant, (*insert alleged principal’s name*).**

**Notes on Use**

1. This instruction should be used in cases involving agent indepen-

dent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal's behalf and bind the principal in contract. **Grease Monkey Int'l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent's torts if the agent is acting with apparent authority. *See Grease Monkey Int'l*, 904 P.2d at 475–76 (holding principal liable for agent's fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who “is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.” **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of authority, or both, is at issue.

4. When there is a dispute as to whether an agency relationship exists, Instruction 8:1 (defining the agency relationship) should be given along with this instruction.

5. When the scope of agency is at issue, Instruction 8:9 (defining scope of authority) should be given with this instruction.

6. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### Source and Authority

1. This instruction is supported by **City of Aurora v. Colorado State Engineer**, 105 P.3d 595, 622 (Colo. 2005); and **Cooley v. Eskridge**, 125 Colo. 102, 241 P.2d 851 (1952).

2. One who hires an independent contractor is generally not vicariously liable for torts committed by the contractor. **Huddleston**, 841 P.2d at 288; **Lopez v. City of Grand Junction**, 2018 COA 97, ¶ 44, 488 P.3d 364. However, an independent contractor may be an agent, and the person engaging such agent may be held vicariously liable for



torts committed by the agent within the scope of the agency. **Cheney v. Hailey**, 686 P.2d 808, 811 (Colo. App. 1984) (“Because an agency relationship existed, [the principal] was vicariously liable whether or not [the agent] was in fact an independent contractor.”); see RESTATEMENT (SECOND) OF AGENCY § 14N (1958).

3. If an independent contractor is not an agent, the doctrine of respondeat superior does not give rise to vicarious liability for the independent contractor’s negligence because an independent contractor, unlike an employee, is not subject to the principal’s control. **Daly v. Aspen Ctr. for Women’s Health, Inc.**, 134 P.3d 450, 452 (Colo. App. 2005).

4. In **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978), the supreme court recognized the “inherently dangerous activity” exception to the general rule that employers of independent contractors are not vicariously liable for the torts of such contractors. See **Huddleston**, 841 P.2d at 288; **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998); **Vikell Inv’rs Pac., Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997); cf. **Schell v. Navajo Freight Lines, Inc.**, 693 P.2d 382 (Colo. App. 1984) (federal administrative regulation requiring independent contractor be treated as employee).

5. Colorado’s Premises Liability Act creates a nondelegable duty that burdens the landowner with full liability regardless of fault imputable to other parties or nonparties. The landowner’s liability does not depend on vicarious liability for injuries caused by conditions created by a landowner’s agent. **Reid v. Berkowitz**, 2016 COA 28, ¶¶ 22–23, 370 P.3d 644.

6. A party may sue a principal on a theory of vicarious liability even if the party executes a covenant not to sue the agent and that covenant does not expressly reserve the right to sue the principal. **McShane v. Stirling Ranch Prop. Owners Ass’n**, 2017 CO 38, ¶¶ 25–26, 393 P.3d 978 (citing **Dworak v. Olson Constr. Co.**, 191 Colo. 161, 551 P.2d 198 (1976)).



## 8:19 PRINCIPAL AND AGENT—BOTH PARTIES SUED—NO ISSUE AS TO RELATIONSHIP AND SCOPE OF AUTHORITY

**The defendant, (*agent's name*), was the agent of the defendant, (*principal's name*), at the time of the (*insert appropriate description of events, e.g., "occurrence," "promise was made," "representation was made," etc.*).**

**For the plaintiff, (*name*), to recover on (his) (her) (its) claim(s) of (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*) against the defendant, (*principal's name*), you must find that the plaintiff proved by a preponderance of the evidence (his) (her) (its) (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*) claim(s) against the defendant, (*agent's name*).**

**If you find that the plaintiff, (*name*), has not proved (his) (her) (its) claim(s) against the defendant, (*agent's name*), then your verdict must be for the defendant, (*principal's name*), on the claim(s) of (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*).**

**On the other hand, if you find that the plaintiff, (*name*), has proved (his) (her) (its) claim(s) against the defendant, (*agent's name*), then your verdict must be for the plaintiff on (his) (her) (its) claim(s) of (*insert applicable theory of liability, e.g., "breach of fiduciary duty"*), against the defendant, (*principal's name*).**

### Notes on Use

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal's behalf and bind the principal in contract. **Grease Monkey Int'l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent's torts if the agent is acting with apparent authority. *See id.* at 475–76 (holding principal liable for agent's fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who "is not a fiduciary, has no power to make the one employing him a party

to a transaction, and is subject to no control over his conduct.” **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also* **Grease Monkey**, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass’n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. This instruction should be given when there is no dispute as to the relationship and scope of authority.

4. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### Source and Authority

See the Source and Authority to Instruction 8:18.

## 8:20 PRINCIPAL AND AGENT—ONLY PRINCIPAL SUED—ISSUE AS TO RELATIONSHIP AND/OR SCOPE OF AUTHORITY

**For the plaintiff, *(name)*, to recover on *(his)* *(her)* *(its)* claim of *(insert applicable theory of liability, e.g., "breach of fiduciary duty")* against defendant, *(alleged principal's name)*, you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved *(his)* *(her)* *(its)* *(insert applicable theory of liability, e.g., "breach of fiduciary duty")* claim(s);**

**(2. *[Alleged agent's name]*, was the agent of the defendant, *[alleged principal's name]*, at the time of the *[insert appropriate description of events, e.g., "occurrence," "promise was made," "representation was made," etc.]* [*.*] [*;* and])**

**(3. *[Alleged agent's name]* was acting within the scope of *[his]* *[her]* *[its]* authority at the time of the *[insert appropriate description of events, e.g., "occurrence," "promise was made," "representation was made," etc.]*.)**

**If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant, *(alleged principal's name)*, on the claim(s) of *(insert applicable theory of liability, e.g., "breach of fiduciary duty")*.**

**On the other hand, if you find that all of these *(number)* statements have been proved, then your verdict must be for the plaintiff on the claim(s) of *(insert applicable theory of liability, e.g., "breach of fiduciary duty")*, against the defendant, *(alleged principal's name)*.**

### Notes on Use

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents



the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal's behalf and bind the principal in contract. **Grease Monkey Int'l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent's torts if the agent is acting with apparent authority. *See id.* at 475–76 (holding principal liable for agent's fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who “is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct.” **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of authority, or both, is at issue.

4. When there is a dispute as to whether an agency relationship exists, Instruction 8:1 (defining the agency relationship) should be given along with this instruction.

5. When the scope of agency is at issue, Instruction 8:9 (defining scope of authority) should be given with this instruction.

6. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### Source and Authority

See the Source and Authority to Instruction 8:18.



## 8:21 PRINCIPAL AND AGENT—ONLY PRINCIPAL SUED—NO ISSUE AS TO RELATIONSHIP AND SCOPE OF AUTHORITY

(Agent's name) was the agent of the defendant, (principal's name), at the time of the (insert appropriate description of events, e.g., "occurrence," "promise was made," "representation was made," etc.). Any act or omission of (agent's name) is the act or omission of the defendant, (principal's name).

### Notes on Use

1. This instruction should be used in cases involving agent independent contractors. An agent independent contractor is one who represents the principal contractually and may, with proper authorization, make contracts or other negotiations on the principal's behalf and bind the principal in contract. **Grease Monkey Int'l v. Montoya**, 904 P.2d 468, 473 (Colo. 1995). A principal may be liable for the agent's torts if the agent is acting with apparent authority. *See id.* at 475–76 (holding principal liable for agent's fraudulent misrepresentation).

2. A principal is generally not liable for the torts of a non-agent independent contractor. A non-agent independent contractor is one who "is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control over his conduct." **Digital Landscape Inc. v. Media Kings LLC**, 2018 COA 142, ¶ 79, 440 P.3d 1200, 1212; *see also Grease Monkey*, 904 P.2d at 473. The general rule is subject to three limited exceptions: nondelegable duties, *see, e.g., Springer v. City & Cty. of Denver*, 13 P.3d 794 (Colo. 2000) (Premises Liability Act); inherently dangerous activities, *see Huddleston v. Union Rural Elec. Ass'n*, 841 P.2d 282 (Colo. 1992); and ultrahazardous activities, *see Garden of the Gods Vill., Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597 (1956). This instruction should not be used in cases involving non-agent independent contractors. For instructions concerning those exceptions, *see* Instruction 9:7 (inherently dangerous activities); Instruction 9:7A (ultrahazardous activities); and Chapter 12 (premises liability).

3. This instruction should be given when there is no dispute as to the relationship and scope of agency.

4. For cases involving employment relationships, use the instructions in Part C of this chapter instead of this instruction.

### Source and Authority

See the Source and Authority to Instruction 8:18.

### **C. LIABILITY ARISING FROM RESPONDEAT SUPERIOR**

#### **8:22 EMPLOYER AND EMPLOYEE—BOTH PARTIES SUED—ISSUE AS TO RELATIONSHIP AND/OR SCOPE OF EMPLOYMENT**

**For the plaintiff, (name), to recover on (his) (her) (its) claims of (insert applicable theory of liability, e.g., “negligence”) against defendant, (alleged employer’s name), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (insert applicable theory of liability, e.g., “negligence”) claim(s) against the defendant, (alleged employee’s name);**

**(2. The defendant, [alleged employee’s name], was the employee of the defendant, [alleged employer’s name], at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.] [.] [; and])**

**(3. The defendant, [alleged employee’s name], was acting within the scope of [his] [her] [its] employment at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.].)**

**If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant, (alleged employer’s name), on the claim(s) of (insert applicable theory of liability, e.g., “negligence”).**

**On the other hand, if you find that all of these (number) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (insert applicable theory of liability, e.g., “negligence”), against the defendant, (insert alleged employer’s name).**



### Notes on Use

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of employment, or both, is at issue.

3. When there is a dispute as to whether the alleged tortfeasor is an employee or an independent contractor, Instructions 8:4 (defining employer and employee) and 8:5 (defining independent contractor) should be given along with this instruction.

4. When the scope of employment is at issue, Instruction 8:8 (defining scope of employment) should be given with this instruction.

### Source and Authority

1. This instruction is supported by **Raleigh v. Performance Plumbing & Heating**, 130 P.3d 1011 (Colo. 2006); and **Grease Monkey International, Inc. v. Montoya**, 904 P.2d 468 (Colo. 1995). See also **McDonald v. Lakewood Country Club**, 170 Colo. 355, 461 P.2d 437 (1969) (employer liable for torts of employee committed while acting within scope of employment); **Bernardi v. Cmty. Hosp. Ass'n**, 166 Colo. 280, 443 P.2d 708 (1968) (hospital employer liable for negligence of employee nurse acting within scope of employment); **Hynes v. Donaldson**, 155 Colo. 456, 395 P.2d 221 (1964) (traveling employee acting within scope of employment because dining and lodging are activities incidental to employment); **Gibbons & Reed Co. v. Howard**, 129 Colo. 262, 269 P.2d 701 (1954) (employees not acting within scope of employment when borrowing company vehicle to move personal belongings); **Marron v. Helmecke**, 100 Colo. 364, 67 P.2d 1034 (1937) (employee not acting within scope of employment when conduct is not connected with the employer's business); **Crosswaith v. Thomason**, 95 Colo. 240, 35 P.2d 849 (1934); **Lovejoy v. Denver & Rio Grande R.R.**, 59 Colo. 222, 146 P. 263 (1915); **Novelty Theater Co. v. Whitcomb**, 47 Colo. 110, 106 P. 1012 (1909); **Pierce v. Conners**, 20 Colo. 178, 37 P. 721 (1894); **Denver, S. Park & Pac. R.R. v. Conway**, 8 Colo. 1, 5 P. 142 (1884) (corporate employer held liable for negligence of employee); **Suydam v. FLI Fort Pierce, Inc.**, 2020 COA 144M, ¶ 13, 490 P.3d 930, 934 ("Under the doctrine of respondeat superior, an employer is liable for torts committed by its employee while acting within the scope of his or her employment. The employer is liable if the employee's conduct was motivated by an intent to serve the employer's interests and connected to acts the employee was authorized to perform." (citation omitted)).

2. The doctrine of respondeat superior is based on the theory that the employee is the agent of the employer. **Daly v. Aspen Ctr. for Women's Health, Inc.**, 134 P.3d 450 (Colo. App. 2005); see **Connes v. Molalla Transp. Sys., Inc.**, 831 P.2d 1316, 1320-21 (Colo. 1992).

3. Respondeat superior applies only to those acts committed while the employee was acting within the scope of employment. **Grease Monkey Int'l**, 904 P.2d at 473; see **Suydam**, 2020 COA 144M, ¶ 14.

4. A supervising employee is not individually liable under the doctrine of respondeat superior for torts committed by subordinate employees. **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985).

5. The doctrine of respondeat superior does not bar recovery against individual corporate agents for torts committed while acting on behalf of the corporation. **JW Constr. Co. v. Elliott**, 253 P.3d 1265, 1270 (Colo. App. 2011) (“[A]n officer of a corporation is liable for torts that he or she personally commits even if acting in an official capacity on behalf of the corporation.”); **Colo. Coffee Bean, LLC v. Peaberry Coffee Inc.**, 251 P.3d 9, 28 (Colo. App. 2010) (“Corporate agents are liable for torts of the corporation if they approved of, sanctioned, directed, actively participated in, or cooperated in such conduct.”); **Hoang v. Arbess**, 80 P.3d 863, 867 (Colo. App. 2003) (a corporate officer may “be held personally liable for his or her individual acts . . . even though committed on behalf of the corporation, which is also held liable”); **Sanford v. Kobey Bros. Constr. Corp.**, 689 P.2d 724, 725 (Colo. App. 1984) (when an officer, director, or agent of a corporation “personally commit[s] any negligent act, judgment should also [enter] against [the individual] personally”); see also **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (whether an individual defendant approved of, directed, actively participated in, or cooperated in the corporation’s negligent conduct is usually a question of fact for the jury).

6. Although an employer may not be liable under the doctrine of respondeat superior for a tort committed by an employee acting outside the scope of employment, the employer may be liable for the harm caused by the employee if it resulted from the employer’s negligent supervision of the employee. **Destefano v. Grabrian**, 763 P.2d 275 (Colo. 1988); see also **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993) (negligent hiring and supervision).

7. Respondeat superior liability is a derivative, or secondary, liability. See **Ferrer v. Okbamicael**, 2017 CO 14M, ¶ 30, 390 P.3d 836, 845 (subsequently abrogated by section 13-21-111.5(1.5), C.R.S., effective for cases filed on or after September 7, 2021); see also **Arnold v. Colo. State Hosp.**, 910 P.2d 104, 107 (Colo. App. 1995) (“An employer’s liability for an employee’s negligence based upon respondeat superior is only a secondary liability.”). Derivative liability means there must be some finding of employee culpability in order to find liability on the part of the employer. **Ferrer**, ¶ 30. An employer cannot be found liable for direct negligence claims, such as negligent hiring, supervision and retention, or entrustment, unless the employee’s own negligence causes an injury. *Id.* at ¶ 29. Therefore, when “an employer acknowledges vicarious liability for its employee’s negligence, a plaintiff’s direct



negligence claims against the employer are barred.” *Id.* at ¶ 19. *But see Brown v. Long Romero*, 2021 CO 67, ¶ 29 (plaintiff’s direct negligence claims against an employer are not barred where the plaintiff does not assert vicarious liability for an employee’s negligence).

8. Further, because the doctrine of respondeat superior is derivative in nature, the employer and employee are not joint tortfeasors. *Marso v. Homeowners Realty, Inc.*, 2018 COA 15M, ¶ 17, 418 P.3d 542; *Arnold*, 910 P.2d at 107 (Uniform Contribution Among Tortfeasors Act, §§ 13-50.5-101 to -106, C.R.S., is not applicable).

9. A defense available to an employee may also be applicable to the employer. *See, e.g.*, § 13-21-108, C.R.S. (exemption for civil liability while rendering emergency assistance). However, “although a finding that an employee is not negligent requires a finding that the employer is not legally responsible, an action may proceed against an employer if the claim against the employee has been dismissed or barred, not on the merits of the claim, but on procedural grounds.” *Gallegos v. City of Monte Vista*, 976 P.2d 299, 301 (Colo. App. 1998) (statute of limitations defense by employee did not bar respondeat superior claim against employer).

10. A principal may also be vicariously liable for the fraudulent acts of the employee or nonemployee agent if those acts were committed while the agent was acting with apparent authority. *Grease Monkey Int’l*, 904 P.2d at 473. To find vicarious liability under this theory, the plaintiff must establish that the “agent was put in a position which enabled the agent to commit fraud, the agent acted within his [or her] apparent authority, and the agent committed fraud.” *Id.* at 475 (citing RESTATEMENT (SECOND) OF TORTS § 261 (1958)).

11. For a discussion of the applicability of the doctrine of respondeat superior to medical professional service corporations, see *Pediatric Neurosurgery, P.C. v. Russell*, 44 P.3d 1063 (Colo. 2002) (interpreting statute governing the formation and operation of medical professional service corporations, § 12-36-134, C.R.S.). However, in 2003, the General Assembly declared that the supreme court’s decision in *Russell* would “no longer” reflect the law of section 12-36-134. Ch. 240, sec. 1, § 12-36-134, 2003 Colo. Sess. Laws 1598. *See Daly*, 134 P.3d at 452 (healthcare facility did not “employ doctors, perform medical services, or interfere with a doctor’s independent medical judgment . . . [and thus could] not be held accountable under the doctrine of respondeat superior for the doctor’s alleged negligence”).

12. Employees commuting between home and work are not ordinarily acting within the scope of employment. *Stokes v. Denver Newspaper Agency, LLP*, 159 P.3d 691 (Colo. App. 2006) (worker’s compensation cases differ from respondeat superior cases); *Beeson v. Kelran Constructors, Inc.*, 43 Colo. App. 505, 608 P.2d 369 (1979). Therefore, an employee’s negligence while driving to or from work will

not create respondeat superior liability. **Stokes**, 159 P.3d at 693; *cf. Goettman v. N. Fork Valley Rest.*, 176 P.3d 60, 70 (Colo. 2007) (a traveling employee is acting within the scope of his or her employment while lodging and dining on business trip because those activities are incident to employment).

13. Whether an employee was acting within the scope of employment is a question of fact. **Suydam**, 2020 COA 144M, ¶ 15.

### **8:23 EMPLOYER AND EMPLOYEE—BOTH PARTIES SUED—NO ISSUE AS TO RELATIONSHIP AND SCOPE OF EMPLOYMENT**

**The defendant, (*employee's name*), was the employee of the defendant, (*employer's name*), at the time of the (*insert appropriate description of events, e.g., "occurrence," "collision," "accident," etc.*).**

**For the plaintiff, (*name*), to recover on (his) (her) (its) claim(s) of (*insert applicable theory of liability, e.g., "negligence"*) against the defendant, (*employer's name*), you must find that the plaintiff proved by a preponderance of the evidence (his) (her) (its) (*insert appropriate theory of liability, e.g., "negligence"*) claim(s) against the defendant, (*employee's name*).**

**If you find that the plaintiff, (*name*), has not proved (his) (her) (its) claim(s) against the defendant, (*employee's name*), then your verdict must be for the defendant, (*employer's name*), on the claim(s) of (*insert applicable theories of liability, e.g., "negligence"*).**

**On the other hand, if you find that the plaintiff, (*name*), has proved (his) (her) (its) claim(s) against the defendant, (*employee's name*), then your verdict must be for the plaintiff on (his) (her) (its) claim(s) of (*insert applicable theories of liability, e.g., "negligence"*), against the defendant, (*employer's name*).**

#### **Notes on Use**

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. This instruction should be given whenever there is no dispute as to the relationship and scope of employment.

#### **Source and Authority**

See the Source and Authority to Instruction 8:22.



**8:24 EMPLOYER AND EMPLOYEE—ONLY  
EMPLOYER SUED—ISSUE AS TO  
RELATIONSHIP AND/OR SCOPE OF  
EMPLOYMENT**

**For the plaintiff, (name), to recover on (his) (her) (its) claim of (insert appropriate theories of liability, e.g., “negligence”) against the defendant, (alleged employer’s name), you must find that all of the following have been proved by a preponderance of the evidence:**

**1. The plaintiff proved (his) (her) (its) (insert applicable theory of liability, e.g., “negligence”) claim(s);**

**(2. [Alleged employee’s name], was the employee of the defendant, [alleged employer’s name], at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.] [.] [; and])**

**(3. [Alleged employee’s name] was acting within the scope of [his] [her] [its] employment at the time of the [insert appropriate description of events, e.g., “occurrence,” “collision,” “accident,” etc.].)**

**If you find that any one or more of these (number) statements has not been proved, then your verdict must be for the defendant, (alleged employer’s name), on the claim(s) of (insert applicable theory of liability, e.g., “negligence”).**

**On the other hand, if you find that all of these (number) statements have been proved, then your verdict must be for the plaintiff on the claim(s) of (insert applicable theory of liability, e.g., “negligence”), against the defendant, (insert alleged employer’s name).**

**Notes on Use**

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.

2. Use whichever parenthesized phrases are appropriate depending on whether the relationship or scope of employment, or both, is at issue.



3. When there is a dispute as to whether the alleged tortfeasor is an employee or an independent contractor, Instructions 8:4 (defining employer and employee) and 8:5 (defining independent contractor) should be given along with this instruction.

4. When the scope of employment is at issue, Instruction 8:8 (defining scope of employment) should be given with this instruction.

### **Source and Authority**

See the Source and Authority to Instruction 8:22.

**8:25 EMPLOYER AND EMPLOYEE—ONLY  
EMPLOYER SUED—FV ISSUE AS TO  
RELATIONSHIP AND SCOPE OF  
EMPLOYMENT**

*(Employee's name)* was the employee of the defendant, *(employer's name)*, at the time of the *(insert appropriate description of events, e.g., "occurrence," "collision," "accident," etc.)*. **Any act or omission of *(employee's name)* is the act or omission of the defendant, *(employer's name)*.**

**Notes on Use**

1. This instruction should be given in cases involving employer-employee relationships. For other agency relationships, use the instructions in Part B of this chapter.
2. This instruction should be given whenever there is no dispute as to the relationship and scope of employment.

**Source and Authority**

See the Source and Authority to Instruction 8:22.

## **CHAPTER 9. NEGLIGENCE— GENERAL CONCEPTS**

### **Introductory Note**

#### **A. NEGLIGENCE AND DUTY OF CARE**

- 9:1 Elements of Liability—No Negligence of the Plaintiff
- 9:2 Negligent Infliction of Emotional Distress—Elements of Liability
- 9:3 Negligent Misrepresentation Causing Physical Harm—Elements of Liability
- 9:4 Negligent Misrepresentation Causing Financial Loss in A Business Transaction—Elements of Liability
- 9:5 Negligent Misrepresentation Causing Financial Loss in A Business Transaction—Unreasonable Reliance—Defined
- 9:6 Negligence—Defined (Including Assumption of the Risk and Comparative Negligence Cases)
- 9:7 Negligence—Defined—Inherently Dangerous Activities
- 9:7A Ultrahazardous Activities Resulting in Strict Liability
- 9:8 Reasonable Care—Defined
- 9:9 Children—Standard of Care—Negligence (Including Comparative Negligence Cases)
- 9:10 Volunteer—Duty of Care
- 9:11 SUDDEN EMERGENCY
- 9:12 Happening of Accident not Presumptive Negligence
- 9:13 Looking But Failing to See as Negligence
- 9:14 Negligence Per Se—Violation of Statute or Ordinance
- 9:15 Conduct in Compliance With Statute or Ordinance and Justifiable Violation of Statute
- 9:16 Unknowing Violation of Statute or Ordinance
- 9:17 Res Ipsa Loquitur—Permissible Inference Arising From Rebuttable Presumption of Negligence

#### **B. CAUSATION**

##### **Special Note**

- 9:18 Cause When Only One Cause is Alleged—Defined
- 9:19 Concurrent Causes (Excluding Designated Nonparty Fault Cases)
- 9:20 Cause—Concurrent Causes—Intervening Causes
- 9:21 Cause—Foreseeability Limitation

#### **C. COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT**

##### **Special Note**

- 9:22 Elements of Liability—Comparative Negligence
- 9:23 Affirmative Defense—Comparative Negligence of the Plaintiff
- 9:24 Affirmative Defense—Negligence or Fault of Designated Nonparty
- 9:25 Negligence of Parents Not Imputable to Children
- 9:26 Comparative Negligence of Plaintiff—Single Defendant—No Designated Nonparty Involved
- 9:26A Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Single Defendant—No Designated Nonparty
- 9:26B Special Verdict Forms—Comparative Negligence Of the Plaintiff—No Counterclaim—Single Defendant—No Designated Nonparty—Forms A And B
- 9:26C Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—No Counterclaim—Single Defendant—No Designated Nonparty (Alternative to Instruction 9:26A)
- 9:26D Special Verdict Forms—Comparative Negligence of the Plaintiff—No Counterclaim—Single Defendant—No Designated Nonparty—Forms A and B (Alternative to Instruction 9:26B)
- 9:27 Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty Involved
- 9:27A Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty
- 9:27B Special Verdict Forms—Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty—Forms A and B
- 9:27C Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty (Alternative to Instruction 9:27A)
- 9:27D Special Verdict Forms—Comparative Negligence of the Plaintiff—Multiple Defendants—No Designated Nonparty—Forms A and B (Alternative to Instruction 9:27B)
- 9:28 Comparative Negligence of Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved
- 9:28A Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved
- 9:28B Special Verdict Forms—Comparative Negligence of the Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved—forms A and B



- 9:28C Special Verdict Questions—Mechanics for Submitting—Comparative Negligence of the Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved (Alternative to Instruction 9:28A)
- 9:28D Special Verdict Forms—Comparative Negligence of The Plaintiff—Single Defendant or Multiple Defendants—Designated Nonparty or Nonparties Involved—Forms A and B (Alternative to Instruction 9:28B)
- 9:29 Elements—Multiple Defendants or One or More Defendants and One or More Designated Nonparties—No Negligence or Fault of Plaintiff
- 9:29A Special Verdict Questions—Mechanics for Submitting—Multiple Defendants or One or More Defendants and One or More Designated Nonparties—No Negligence or Fault of Plaintiff
- 9:29B Special Verdict Forms—Multiple Defendants or One or More Defendants and One or More Designated Nonparties—No Negligence or Fault of Plaintiff—Forms A and B

**D. WILLFUL AND WANTON NEGLIGENCE**

- 9:30 Willful and Wanton Conduct Or Willful and Reckless Disregard—Defined

**E. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS HAVE BEEN PREPARED**

- 9:31 Contributory Negligence, Contributory Negligence of (Spouse) (Parent) (Child), and Assumption of Risk

**F. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS SHOULD BE GIVEN**

- 9:32 Rescue Doctrine, Unavoidable Accident, and Last Clear Chance

## Introductory Note

**Liability**

1. To recover on a negligence claim, the plaintiff must establish the existence of a legal duty on the part of the defendant, a breach of that duty, causation, and damages. **United Blood Servs. v. Quintana**, 827 P.2d 509 (Colo. 1992); **Observatory Corp. v. Daly**, 780 P.2d 462 (Colo. 1989); **Perreira v. State**, 768 P.2d 1198 (Colo. 1989); **Leake v. Cain**, 720 P.2d 152 (Colo. 1986). Generally, a legal duty to use due care arises in response to a foreseeable and unreasonable risk of harm to others. **Quintana**, 827 P.2d at 519; **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989).

2. In determining whether a person has a duty to act or refrain from acting to avoid injury to others, the nature of the inquiry is essentially whether recognizing a duty would comport with fairness under contemporary standards. **Peterson v. Halsted**, 829 P.2d 373 (Colo. 1992). To decide this, the court must consider several factors, including the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor. **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992); **Lyons**, 770 P.2d at 1254. Ultimately, whether a duty exists depends on considerations of policy. **Univ. of Denver v. Whitlock**, 744 P.2d 54 (Colo. 1987). These policy considerations militate more strongly against the imposition of a duty in cases involving an alleged negligent failure to act, i.e., a failure to take affirmative action to protect others from harm. *Id.* at 57. Generally, in nonfeasance, as opposed to misfeasance cases, a duty is recognized only if there is a "special relationship" between the parties or between the plaintiff and a third-party tortfeasor. *Id.* In nonfeasance cases, a duty has been recognized only in limited circumstances involving special relationships such as: (1) common carrier/passenger; (2) innkeeper/guest; (3) employer/employee; (4) landowner/invited guest; (5) parent/child; and (6) hospital/patient. See **Rocky Mountain Planned Parenthood, Inc. v. Wagner**, 2020 CO 51, ¶ 44, 467 P.3d 287; **N.M. v. Trujillo**, 2017 CO 79, ¶ 27, 397 P.3d 370; **Garcia v. Colo. Cab Co.**, 2019 COA 3, ¶ 10, *rev'd on other grounds*, 2020 CO 55, 467 P.3d 302; **Groh v. Westin Operator, LLC**, 2013 COA 39, ¶ 28, 352 P.3d 472, *aff'd*, 2015 CO 25, 347 P.3d 606; **English v. Griffith**, 99 P.3d 90 (Colo. App. 2004); **Lewis v. Emil Clayton Plumbing Co.**, 25 P.3d 1254 (Colo. App. 2000). For a discussion of the differing policy considerations in misfeasance and nonfeasance

cases, see **Smit v. Anderson**, 72 P.3d 369 (Colo. App. 2002). See also **Blakesley v. Burlington N. Santa Fe Ry.**, 2019 COA 119, ¶¶ 16–35, 459 P.3d 715; **Groh**, 2013 COA 39, ¶¶ 27–30; **In re 2010 Denver Cty. Grand Jury**, 2012 COA 45, ¶¶ 25–31, 296 P.3d 168; **W. Innovations, Inc. v. Sonitrol Corp.**, 187 P.3d 1155 (Colo. App. 2008); **Montoya v. Connolly's Towing, Inc.**, 216 P.3d 98 (Colo. App. 2008).

3. To prove that a defendant assumed a duty, the plaintiff must establish that: (1) the defendant undertook to render services that were reasonably calculated to prevent the type of harm that befell the plaintiff; and (2) either the defendant's undertaking increased the plaintiff's risk or the plaintiff relied on the defendant to perform those services. **P.W. v. Children's Hosp. Colo.**, 2016 CO 6, ¶ 21, 364 P.3d 891 (applying the assumed duty doctrine to comparative negligence); **Cooper v. United States Ski Ass'n**, 32 P.3d 502 (Colo. App. 2000), *rev'd on other grounds*, 48 P.3d 1229 (Colo. 2002). See also Notes on Use to Instruction 9:10 (volunteer—duty of care).

4. The existence and scope of a legal duty are generally questions of law for the court to determine. **Peterson**, 829 P.2d at 379; **Imperial Distrib. Servs., Inc. v. Forrest**, 741 P.2d 1251 (Colo. 1987); **Metro. Gas Repair Serv., Inc. v. Kulik**, 621 P.2d 313 (Colo. 1980). However, there may be rare cases where “the evidence presents a jury question on whether the injured party was a person within the foreseeable zone of danger created by defendant's negligence and thus was owed a duty by defendant.” **Chutich v. Samuelson**, 33 Colo. App. 195, 201, 518 P.2d 1363, 1367 (1973), *aff'd in part, rev'd in part on other grounds*, 187 Colo. 155, 529 P.2d 631 (1974). Nevertheless, if the court concludes that injury to a person in plaintiff's situation was foreseeable as a matter of law, it is reversible error to submit the issue of foreseeability to the jury. *Id.*; see also **Walcott v. Total Petroleum, Inc.**, 964 P.2d 609 (Colo. App. 1998) (risk that purchaser of gasoline would intentionally throw it on victim and set victim on fire was not reasonably foreseeable by operator of service station); **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992), *aff'd on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); **Sewell v. Pub. Serv. Co.**, 832 P.2d 994 (Colo. App. 1991). In those cases where foreseeability is a factual question for the jury to determine, Instruction 9:21 should be used. See generally **P.W.**, 2016 CO 6, ¶ 24 n.7 (negligence cases address foreseeability twice, first as part of a duty inquiry, a legal issue, and second as the “touchstone of proximate cause,” a fact issue). Whether a party has assumed a



duty not otherwise imposed by law is a mixed question of law and fact. **Pressey v. Children’s Hosp. Colo.**, 2017 COA 28, ¶ 39, 488 P.3d 151.

5. For additional cases discussing the existence of a legal duty, see the Source and Authority to Instruction 9:1 under the subtopic “Existence and Scope of a Legal Duty.”

### **The Economic Loss Rule**

6. Generally, under Colorado law, in the absence of physical harm to a person or property, breach of a contractual duty does not give rise to a claim for negligence unless the facts supporting the negligence claim are different from the facts supporting the breach of contract claim. *See, e.g., Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267 (Colo. 2000) (distinguishing between tort and contract claims); **Town of Alma v. AZCO Constr., Inc.**, 10 P.3d 1256 (Colo. 2000) (under economic loss rule, no tort action for negligence where only damages are for economic loss); **Miller v. Bank of N.Y. Mellon**, 2016 COA 95, ¶¶ 17-36, 379 P.3d 342 (borrower’s tort claims against lender were barred by the economic loss rule, and neither (1) a consent judgment to which borrower was not a party nor (2) the lender-borrower relationship gave rise to an independent duty sufficient to avoid application of the rule); **Engeman Enters., LLC v. Tolin Mech. Sys. Co.**, 2013 COA 34, ¶ 9, 329 P.3d 364 (economic loss rule bars tort claims where there is no duty independent of contract); **Stan Clauson Assocs., Inc. v. Coleman Bros. Constr., LLC**, 2013 COA 7, ¶ 14, 297 P.3d 1042 (same); **Casey v. Colo. Higher Educ. Ins. Benefits All. Tr.**, 2012 COA 134, ¶ 22, 310 P.3d 196 (economic loss rule bars tort claims only as between contracting parties); **Former TCHR, LLC v. First Hand Mgmt. LLC**, 2012 COA 129, ¶ 33, 317 P.3d 1226 (fraud and misrepresentation claims were dependent on contract duties and were, thus, barred by economic loss rule); **Steward Software Co. v. Kopcho**, 275 P.3d 702 (Colo. App. 2010) (economic loss rule applied equally to torts based on an underlying contract whether written or oral), *rev’d on other grounds*, 266 P.3d 1085 (Colo. 2011); **U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.**, 192 P.3d 543 (Colo. App. 2008) (contract established parties’ duties and economic loss rule precluded tort claim); **Cissell Mfg. Co. v. Park**, 36 P.3d 85 (Colo. App. 2001) (same); *see also* **BRW, Inc. v. Dufficy & Sons, Inc.**, 99 P.3d 66 (Colo. 2004) (economic loss rule barred negligence claims by subcontractor against project engineer for negligent design and inspection of public works project); **A Good Time Rental, LLC v. First Am. Title Agency, Inc.**, 259 P.3d 534 (Colo. App. 2011) (economic loss rule barred claim that closing



agent failed to exercise reasonable care in performing contract and claim that closing agent negligently misrepresented that it was performing obligation imposed by closing instructions); **Parr v. Triple L & J Corp.**, 107 P.3d 1104 (Colo. App. 2004) (economic loss rule generally bars only economic damages); **City of Westminster v. Centric-Jones Constructors**, 100 P.3d 472 (Colo. App. 2003); **Terrones v. Tapia**, 967 P.2d 216 (Colo. App. 1998) (no cause of action in tort for negligent breach of contractual duty); **Chellsen v. Pena**, 857 P.2d 472 (Colo. App. 1992) (no cause of action in tort for negligent breach of contractual duty resulting in purely economic damages); **Scott Co. of Cal. v. MK-Ferguson Co.**, 832 P.2d 1000 (Colo. App. 1991) (same), *overruled on other grounds by* **Lewis v. Lewis**, 189 P.3d 1134 (Colo. 2008); **Centennial Square, Ltd. v. Resolution Tr. Co.**, 815 P.2d 1002 (Colo. App. 1991); **Jardel Enters., Inc. v. Triconsultants, Inc.**, 770 P.2d 1301 (Colo. App. 1988) (applying economic loss rule which precludes recovery for negligence when duty breached is contractual and only economic losses are incurred). *But see* **Tanktech, Inc. v. First Interstate Bank**, 851 P.2d 174 (Colo. App. 1992) (if contract claim does not preclude negligence claim, relevant provisions of contract are admissible to establish appropriate standard of care to apply to alleged tortfeasor's conduct), *rev'd on other grounds*, 864 P.2d 116 (Colo. 1993). The economic loss rule may apply to an entity that did not exist at the time a duty was contractually created under the interrelated contracts doctrine if that entity is a party to a contract that is sufficiently interrelated with the duty-creating contract or is a third-party beneficiary of the interrelated contract. **S K Peightal Engineers, LTD v. Mid Valley Real Estate Sols. V, LLC**, 2015 CO 7, ¶ 16, 342 P.3d 868.

7. However, the economic loss rule does not apply where the defendant owes the plaintiff a duty of care independent of any contractual duty. **Van Rees v. Unleaded Software, Inc.**, 2016 CO 51, ¶ 15, 373 P.3d 603 (tort claims based on misrepresentations made before the formation of contracts, which allegedly induced plaintiff to enter into the contracts and therefore violated an independent duty in tort to refrain from such conduct, not barred by the economic loss rule); **A.C. Excavating v. Yacht Club II Homeowners Ass'n**, 114 P.3d 862 (Colo. 2005) (plaintiff homeowners association, third-party beneficiary of contract between general contractor and its subcontractors, not barred from enforcing negligence claims against defendant subcontractors, contracting parties, where law recognized duty of care that was independent of defendants' contractual duties); **Foster v. Bd. of Governors**, 2014 COA 18, ¶ 28, 342 P.3d 497 (economic loss rule does not bar recovery where bailee's duty to safely store stal-

lion semen was separate from contractual duties); **Rhino Fund, LLLP v. Hutchins**, 215 P.3d 1186 (Colo. App. 2008) (economic loss rule did not bar claims based on independent tort duty to honor terms of escrow account and not to convert funds); **URS Grp., Inc. v. Tetra Tech FW, Inc.**, 181 P.3d 380 (Colo. App. 2008) (claim based on misrepresentations made before contract executed not barred by economic loss rule); **Andrews v. Picard**, 199 P.3d 6 (Colo. App. 2007) (economic loss rule not applicable where there is duty of care independent of any contractual duty); **Park Rise Homeowners Ass’n v. Res. Constr. Co.**, 155 P.3d 427 (Colo. App. 2006) (economic loss rule not a bar to homeowners’ negligence claim against builder because builder owed homeowner independent duty to use due care in constructing home). Thus, a tort claim for negligence is “not limited by privity of contract”; instead, foreseeability determines its scope. **Forest City Stapleton Inc. v. Rogers**, 2017 CO 23, ¶ 13, 393 P.3d 487. The economic loss rule also does not bar claims for civil theft under section 18-4-405, C.R.S., a statutory right of action created specifically to provide a remedy for even purely economic losses. **Bermel v. BlueRadios, Inc.**, 2019 CO 31, ¶ 42, 440 P.3d 1150; *see also* **McWhinney Centerra Lifestyle Ctr. LLC v. Poag & McEwen Lifestyle Ctrs.-Centerra LLC**, 2021 COA 2, ¶¶ 75–80, 486 P.3d 439 (relying on **Bermel** in holding that the economic loss rule does not apply to claims of fraudulent concealment, intentional interference with contractual obligations, and intentional inducement of breach of contract).

8. A claim for negligent misrepresentation is barred by the “economic loss rule” where the duty allegedly breached is contained in or arises out of the contract. **BRW**, 99 P.3d at 75 (economic loss rule barred negligent misrepresentation claim by subcontractor against project engineer for misrepresentations allegedly made during the performance of the engineer’s contract); **Top Rail Ranch Estates, LLC v. Walker**, 2014 COA 9, ¶ 40, 327 P.3d 321 (tort claim for negligent misrepresentation barred where no independent duties found to exist); **A Good Time Rental**, 259 P.3d at 541 (economic loss rule barred claims that closing agent negligently misrepresented that it was performing a duty imposed by the closing instructions). But when the alleged misrepresentation occurs before the parties entered into their contract, the economic loss rule does not bar the negligent misrepresentation claim. **Van Rees**, 2016 CO 51, ¶¶ 14–19 (economic loss rule does not bar negligent misrepresentation claim where an independent duty of care prohibits contracting party from making negligent misrepresentations in inducing contractual arrangement); **URS Grp.**, 181 P.3d at 391.

## **Damages**

9. No damage instructions have been prepared specifically for negligence cases because the instructions in Chapter 5, General Instructions Relating to Damages, and Chapter 6, Damages for Injuries to Persons or Property, are applicable to both negligence claims and to claims involving other kinds of tortious conduct. However, whenever punitive damages are claimed in a negligence case, Instruction 9:30 (defining willful and wanton conduct or willful and reckless disregard) should be used with Instruction 5:4 (exemplary or punitive damages).

10. For damage instructions and special verdict forms in actions against health care professionals or health care institutions, the instructions in subpart D of Part I of Chapter 15 should be used rather than the instructions in Part C of this chapter.

11. In actions for wrongful death, Instructions 10:3 and 10:4 should be used to instruct the jury on the applicable measure of damages.



**A. NEGLIGENCE AND DUTY OF CARE****9:1 ELEMENTS OF LIABILITY—NO NEGLIGENCE OF THE PLAINTIFF**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. Omit any numbered paragraphs, the facts of which are not in dispute.
2. Use whichever parenthesized words are most appropriate and



omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

### **Comparative Negligence**

3. Whenever the defense of comparative negligence has been properly raised and, pursuant to section 13-21-111, C.R.S., the comparative negligence of the plaintiff must be determined, Instruction 9:22 must be used rather than this instruction, together with the other applicable comparative negligence instructions in Part C of this chapter.

### **Comparative Fault**

4. The instructions in Part C of this chapter should also be used in cases involving multiple defendants or designated nonparties where, under the pro rata liability statute, section 13-21-111.5, C.R.S., the comparative fault of the defendants or the comparative fault of defendant or defendants and one or more designated nonparties must be determined.

### **Related Instructions**

5. In product liability cases where a claim for negligence is asserted, the instructions in Part C of Chapter 14 should be used, rather than this instruction.

6. For negligence claims against attorneys involving an underlying case, i.e., a “case-within-a-case,” Instructions 15:19 and 15:20 should be used rather than this instruction.

7. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

8. In cases in which the plaintiff is claiming damages for fear of his own safety and for the consequential damages caused by that fright, as opposed to damages associated with physical injuries caused more directly by the alleged negligence of the defendant, Instruction 9:2 (negligent infliction of emotional distress) should be used rather than this instruction.

9. For the tort of negligent misrepresentation causing physical harm, *see* Instruction 9:3, and, for the tort of negligent misrepresentation causing financial loss in a business transaction, *see* Instruction 9:4.

10. Whenever this instruction is given, the appropriate instruction or instructions relating to causation must also be given, *see* Instructions

9:18 to 9:20, as well as other appropriate instructions defining the terms used in this instruction, e.g., Instruction 9:6 (defining negligence). Where the issue of foreseeability is presented as part of the causation analysis, Instruction 9:21 (foreseeability limitation) should be given.

11. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

12. Whenever the claim of negligence is against an owner or occupant of premises for failure to have properly maintained the premises or properly carried on an activity which caused injury to a person on the premises, the appropriate instruction in Chapter 12 should be used rather than this instruction. *See, e.g., Lombard v. Colo. Outdoor Educ. Ctr., Inc.*, 187 P.3d 565 (Colo. 2008); *Thornbury v. Allen*, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover only from condominium owner under premises liability statute, § 13-21-115, C.R.S., and “not under any other theory of negligence, general, or otherwise”); *Casey v. Christie Lodge Owners Ass’n*, 923 P.2d 365 (Colo. App. 1996) (premises liability statute was applicable to claim for personal injuries against landowner resulting from dangerous condition of premises allegedly caused by landowner’s negligent hiring, supervision or retention of maintenance employee).

### Description of Legal Duty

13. As to the degree of specificity required in instructing the jury on the existence of a legal duty in a negligence action, *see Woolsey v. Holiday Health Clubs & Fitness Ctrs., Inc.*, 820 P.2d 1201 (Colo. App. 1991) (plaintiff not entitled to instruction that health club had legal duty to supervise whirlpool area and to warn about risks and hazards associated with use of whirlpool where more generalized instructions indicating that health club had legal duty to act reasonably towards its members was given).

### Source and Authority

1. This instruction is supported by *Bayly, Martin & Fay, Inc. v. Pete’s Satire, Inc.*, 739 P.2d 239 (Colo. 1987); *Independent Lumber Co. v. Leatherwood*, 102 Colo. 460, 79 P.2d 1052 (1938); *Thompson v. Riveland*, 714 P.2d 1338 (Colo. App. 1986) (proof of compensable harm or damages is a necessary element of liability); and *Camacho v. Mennonite Board of Missions*, 703 P.2d 598 (Colo. App. 1985). Also, in general support of this instruction, *see* the instructions approved in *Folck v. Haser*, 164 Colo. 11, 432 P.2d 245 (1967). The supreme court cited with approval an instruction based on this pattern instruction in *Rains v. Barber*, 2018 CO 61, ¶ 18, 420 P.3d 969.

### Existence and Scope of a Legal Duty

2. This element is discussed in the “Liability” section of the



Introductory Note to this chapter. Many additional Colorado Supreme Court cases discuss the existence and scope of a legal duty. *See Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 42, 467 P.3d 287 (Planned Parenthood Federation of America, national parent organization to Planned Parenthood of the Rocky Mountains (PPRM), did not have special relationship with invitees of PPRM's facilities and did not owe duty to protect PPRM's invitees from mass shooting); *N.M. v. Trujillo*, 2017 CO 79, ¶ 24, 397 P.3d 370 (dog owner did not have a special relationship with pedestrians walking by his house and did not owe a duty to prevent dogs from frightening pedestrians); *P.W. v. Children's Hosp. Colo.*, 2016 CO 6, ¶ 25, 364 P.3d 891 (when a hospital admits a person into its custody who it knows is "actively suicidal" and is admitted for the purpose of preventing self-harm, the hospital assumes a duty to use reasonable care in preventing the patient from engaging in self-harm); *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 51, 347 P.3d 606 (hotels have a duty to evict patrons in a reasonable manner); *S K Peightal Eng'rs, LTD v. Mid Valley Real Estate Sols. V, LLC*, 2015 CO 7, ¶¶ 24-26, 342 P.3d 868 (construction professionals do not have independent tort duty to commercial property owner who acquired defective house through deed in lieu of foreclosure when construction contract documents define the relevant duties of the construction professionals and contractors); *Ryder v. Mitchell*, 54 P.3d 885 (Colo. 2002) (child therapist owed no duty to mother of children with respect to letter sent by therapist to the children's father and new therapist opining that mother was alienating children from father); *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879 (Colo. 2002) (anesthesiologist owed duty of care to plaintiff with respect to drug inadvertently left on cart and subsequently given to plaintiff by another physician, even though there was no physician/patient relationship between anesthesiologist and plaintiff); *Martinez v. Lewis*, 969 P.2d 213 (Colo. 1998) (physician retained by insurer to conduct medical examination of insured owed no duty of care to insured to use reasonable care in preparing and making report to insurer regarding insured's medical condition); *Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc.*, 962 P.2d 963 (Colo. 1998) (no duty of administrator of private halfway house to protect plaintiff from dangerous behavior of halfway-house resident); *Trailside Townhome Ass'n v. Acierno*, 880 P.2d 1197 (Colo. 1994) (duty of townhome association to townhome owners who make use of common areas in townhome complex); *Bath Excavating & Constr. Co. v. Wills*, 847 P.2d 1141 (Colo. 1993) (duty of excavation company to city employee injured while attempting to plug leak in water line severed by excavation company); *Greenberg v. Perkins*, 845 P.2d 530 (Colo. 1993) (duty of physician retained by defendant in personal injury action to use due care in subjecting plaintiff to medical tests); *Mile Hi Concrete, Inc. v. Matz*, 842 P.2d 198 (Colo. 1992) (duty of concrete manufacturer to warn user of the dangers of continued exposure to wet concrete); *Connes v. Molalla Transp. Sys., Inc.*, 831 P.2d 1316 (Colo. 1992) (no duty of employer of long-haul truck driver with criminal record to woman sexually assaulted by driver); *Peterson v. Halsted*, 829 P.2d 373 (Colo. 1992) (no duty of father who co-signed loan on automobile purchased by emancipated daughter to victims of

collision that resulted from daughter's driving automobile while intoxicated nearly three years after automobile was purchased); **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992) (duty of employer under negligent entrustment theory to employee who was killed as a result of driving an automobile borrowed from employer when employee was intoxicated); **Observatory Corp. v. Daly**, 780 P.2d 462 (Colo. 1989) (duty of tavern owner to prevent injury to patrons); **Perreira v. State**, 768 P.2d 1198 (Colo. 1989) (duty of staff psychiatrist at mental health facility to victim assaulted by patient released by psychiatrist); **Bittle v. Brunetti**, 750 P.2d 49 (Colo. 1988) (no duty of commercial property owners to pedestrian injured on abutting public sidewalk); **Univ. of Denver v. Whitlock**, 744 P.2d 54 (Colo. 1987) (no duty on part of university to prevent student from being injured in trampoline accident at fraternity house); **Taco Bell, Inc. v. Lannon**, 744 P.2d 43 (Colo. 1987) (duty of fast food restaurant to protect patrons from criminal acts of unknown third parties).

3. The Colorado Court of Appeals has also discussed the scope and existence of a legal duty. See **Ferraro v. Frias Drywall, LLC**, 2019 COA 123, ¶ 34, 451 P.3d 1255 (no common law duty for contractors to inspect for asbestos before beginning work on single-family home); **Blakesley v. Burlington N. Santa Fe Ry.**, 2019 COA 119, ¶ 32, 459 P.3d 715 (railroad and its employee who gave jobsite safety instructions to third-party contractor on railroad property owed duty to provide reasonable instructions); **Wagner v. Planned Parenthood Fed'n of Am., Inc.**, 2019 COA 26, ¶ 11, 471 P.3d 1089 (Planned Parenthood Federation of America did not owe duty to protect clinic patrons or bystanders from mass shooting event when it did not control clinic or own or possess the land on which clinic was situated), *aff'd*, 2020 CO 51, 467 P.3d 287; **Garcia v. Colo. Cab Co.**, 2019 COA 3, ¶ 14, 490 P.3d 415 (taxi cab company did not owe duty to protect non-passenger from battery by taxi passenger when the non-passenger walked up to the taxi believing it was responding to his call for a ride), *rev'd on other grounds*, 2020 CO 55, 467 P.3d 302; **Lopez v. Trujillo**, 2016 COA 53, ¶¶ 15-31, 399 P.3d 750 (homeowner who kept dog in a fenced yard did not owe duty to protect pedestrians on sidewalk adjacent from the yard from being frightened by homeowner's dog, analyzing cases from multiple jurisdictions), *aff'd sub nom. N.M. v. Trujillo*, 2017 CO 79, 397 P.3d 370; **Laughman v. Girtakovskis**, 2015 COA 143, ¶ 14, 374 P.3d 504 (co-participants in a martial arts sparring activity, an inherently dangerous sport, do not owe each other a duty of ordinary care that would support a negligence claim where the conduct at issue was within the realm of conduct anticipated in the sport); **Beasley v. Best Car Buys, LTD**, 2015 COA 145, ¶ 14, 363 P.3d 777 (car vendor has no duty to inquire into a buyer's driving history or to investigate the status of his license, particularly when that vendor has no reason to believe that the purchaser has dangerous driving habits); **Bedee v. Am. Med. Response**, 2015 COA 128, ¶ 30, 361 P.3d 1083 (ambulance driver owes passenger ordinary duty of care, not heightened duty for activity involving increased risk of injury, where ambulance was traveling at normal speeds in a nonemergency situation and the passenger was wearing a



seat belt); **Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC**, 2015 COA 85, ¶ 58, 412 P.3d 751 (law firm owed developer client a duty to render competent advice on insurance coverage issue); **In re Estate of Gattis**, 2013 COA 145, ¶ 17, 318 P.3d 549 (home sellers have independent duty to disclose latent but known defects to home buyers); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 61, 292 P.3d 1232 (When a road contractor finishes contracted work and then leaves the site in a dangerous condition as a result of that work, the contractor has an independent duty for a reasonable period of time either to eliminate the dangerous condition or warn of its existence; however, no such duty exists if the contractor has a good-faith reasonable belief that, after the contractor completed its work, another party would properly take the necessary measures to eliminate the danger or provide adequate warnings to foreseeable users.); **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011) (negligent entrustment); **J.C. v. Dungarvin Colo., LLC**, 252 P.3d 41 (Colo. App. 2010) (providers of services to the developmentally disabled owe no affirmative duty to third parties to warn of dangerous tendencies unless the individual communicated a serious and credible threat against a specific person or a federal or state law or regulation imposes a duty of care under sections 13-21-117.5(4), (6), C.R.S.); **Barfield v. Hall Realty, Inc.**, 232 P.3d 286 (Colo. App. 2010) (“transaction broker” has no duty to investigate property and cannot be liable for negligent misrepresentation without actual knowledge); **Apodaca v. Allstate Ins. Co.**, 232 P.3d 253 (Colo. App. 2009) (insurance agent has no duty to insured beyond acting reasonably to procure the insurance requested by the insured or to notify the insured of the inability or failure to do so), *aff’d on other grounds*, 255 P.3d 1099 (Colo. 2011); **Hamon Contractors, Inc. v. Carter & Burgess, Inc.**, 229 P.3d 282 (Colo. App. 2009) (because the alleged tortious conduct was nonfeasance and no special relationship existed, contractor had no duty to inform project administrator of design flaws during bidding process); **W. Innovations, Inc., v. Sonitrol Corp.**, 187 P.3d 1155 (Colo. App. 2008) (no duty of security company to notify customer whose security alarm was not going off that security system of its neighbor, also a customer, was sounding an alarm); **Montoya v. Connolly’s Towing, Inc.**, 216 P.3d 98 (Colo. App. 2008) (duty of tow yard to disclose to non-employee towing a car it stored that its premises safety rules were not uniformly enforced); **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (no duty of parents, who were passengers with their children in a car driven by another, to protect children by protesting driver’s actions or intervening in driver’s control of vehicle); **E. Meadows Co. v. Greeley Irrigation Co.**, 66 P.3d 214 (Colo. App. 2003) (discussing duty imposed by section 7-42-108, C.R.S., on ditch owners to maintain ditches to prevent water from escaping and injuring property of others); **Command Commc’ns, Inc. v. Fritz Cos.**, 36 P.3d 182 (Colo. App. 2001) (custom brokers had no duty continuously to research rulings on products similar to those imported by their customers); **Cooper v. United States Ski Ass’n**, 32 P.3d 502 (Colo. App. 2000) (ski company owed no duty to skier to supervise skiing instruction of ski club that used ski company facilities but was not associated with the ski company in any way), *rev’d on other*

*grounds*, 48 P.3d 1229 (Colo. 2002); **Lewis v. Emil Clayton Plumbing Co.**, 25 P.3d 1254 (Colo. App. 2000) (plumbing contractor, hired to replace water heater, had no duty to inspect or warn occupants of home of danger posed by defective gas stove); **Weil v. First Nat'l Bank of Castle Rock**, 983 P.2d 812 (Colo. App. 1999) (bank had no duty to inquire into customer's authority to open checking account under unregistered trade name); **Solano v. Goff**, 985 P.2d 53 (Colo. App. 1999) (county sheriff had no duty to protect murder victim from inmate who escaped from county jail); **Campbell v. Burt Toyota-Diahatsu, Inc.**, 983 P.2d 95 (Colo. App. 1998) (no duty of automobile repair shop to warn motorist of danger resulting from modification of seatbelt by motorist's wife); **Snow v. Birt**, 968 P.2d 177 (Colo. App. 1998) (duty of grandparents to protect grandchild from being bitten by father's dog); **Molosz v. Hohertz**, 957 P.2d 1049 (Colo. App. 1998) (no duty of landlords to protect neighbors from tenant's harmful conduct even though landlords knew of tenant's criminal record and violent propensities); **Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.**, 952 P.2d 768 (Colo. App. 1997) (dentist, who allegedly made false representations in book and on television program regarding effect of "dental amalgams" on health of dental patients, had no duty to plaintiff as member of general public); **Keith v. Valdez**, 934 P.2d 897 (Colo. App. 1997) (duty of employer of intoxicated motorist, who was driving employer's van without employer's permission, to driver of another vehicle involved in a collision with employer's van); **Frisone v. Deane Auto. Ctr., Inc.**, 942 P.2d 1215 (Colo. App. 1996) (no duty of automotive center to buyer of used car where center serviced car for previous owner).

4. Earlier decisions by the Colorado Court of Appeals also include discussions of the scope and existence of a legal duty. *See* **Hall v. McBryde**, 919 P.2d 910 (Colo. App. 1996) (duty of parent to neighbor injured by child with parent's gun); **Glover v. Southard**, 894 P.2d 21 (Colo. App. 1994) (attorney who drafted will and trust owed no duty to intended beneficiaries of will and trust); **Jacque v. Pub. Serv. Co.**, 890 P.2d 138 (Colo. App. 1994), (no duty of public utility company to passenger in car who was injured when car struck company's utility pole ten feet from paved portion of highway); **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992) (duty of lessee of housing development to tenants to maintain private roadway in safe condition), *aff'd on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); **Tolman v. CenCor Career Colls., Inc.**, 851 P.2d 203 (Colo. App. 1992) (no duty of private educational corporation to students with respect to quality of education, i.e., no educational malpractice), *aff'd on other grounds*, 868 P.2d 396 (Colo. 1994); **Auxier v. Auxier**, 843 P.2d 93 (Colo. App. 1992) (duty of construction company to provide reasonably safe workplace for nonemployee construction worker), *overruled on other grounds by* **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002); **Sewell v. Pub. Serv. Co.**, 832 P.2d 994 (Colo. App. 1991) (where, in wrongful death action against public utility, material issues of fact existed as to whether accident was reasonably foreseeable, the trial court erred in granting utility's motion for summary judgment on basis that utility owed no duty of care to airplane passenger who died when



airplane crashed into utility's unmarked power lines); **Hines v. Denver & Rio Grande W. R.R.**, 829 P.2d 419 (Colo. App. 1991) (no duty of railroad to wife of victim killed by train properly to investigate accident); **Lego v. Schmidt**, 805 P.2d 1119 (Colo. App. 1990) (no duty of automobile passenger to pedestrian injured by automobile to warn driver of automobile of impending danger); **Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.**, 794 P.2d 264 (Colo. App. 1990) (no duty of insurance agency under an "assumed" duty theory to notify third party of change in insured's liability coverage where insurance agency had previously furnished third party with a certificate verifying insured's liability coverage); **Halter v. Waco Scaffolding & Equip. Co.**, 797 P.2d 790 (Colo. App. 1990) (material issues of fact existed as to whether suppliers of scaffolding and wind clips had duty to warn users of dangers of wrapping scaffolding in protective plastic); **Wheatridge Lumber Co. v. Valley Water Dist.**, 790 P.2d 874 (Colo. App. 1989) (material issues of fact existed with respect to whether water district under an "assumed" duty theory had duty to lumber yard company damaged by fire to have water available at fire hydrant); **May Dep't Stores Co. v. Univ. Hills, Inc.**, 789 P.2d 434 (Colo. App. 1989) (no duty of department store under "assumed" duty theory to existing or future tenants for defects in construction of enclosed mall where department store's lease contained plan approval and consent clauses with respect to alterations in mall); **Felger v. Larimer Cty. Bd. of Cty. Comm'rs**, 776 P.2d 1169 (Colo. App. 1989) (duty of sheriff to protect person in custody from injury by third persons); **Allen v. Ramada Inn, Inc.**, 778 P.2d 291 (Colo. App. 1989) (duty of motel owner to protect guest from injury by third persons); **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988) (no duty under negligent entrustment theory on part of either manufacturer or retailer of rifle to minor child who was accidentally shot by the minor child of the purchaser of the rifle), *overruled on other grounds by* **Casebolt v. Cowan**, 829 P.2d 352, 360 (Colo. 1992) (overruling **Hilberg** to the extent that it "suggest[s] that subsequent ability to control the user of the chattel or the manner in which the chattel is used represent[ ] an essential element of the negligent entrustment theory"); **Leppke v. Segura**, 632 P.2d 1057 (Colo. App. 1981) (duty of defendants who jump-started car of intoxicated person to persons who were injured when involved in automobile collision with intoxicated person).

5. An employer may not recover damages for economic losses incurred as a result of physical injuries to an employee that were caused by the tortious conduct of a third party. **Gonzalez v. Yancey**, 939 P.2d 525 (Colo. App. 1997).

### **Negligent Hiring and Supervision**

6. Colorado recognizes the torts of negligent hiring and negligent supervision. See **Raleigh v. Performance Plumbing & Heating, Inc.**, 130 P.3d 1011 (Colo. 2006) (discussing liability for negligent hiring); **Keller v. Koca**, 111 P.3d 445 (Colo. 2005) (employer owed no duty to 12-year-old girl sexually assaulted by employee on business premises

on day business was closed as risk was unforeseeable); **Moses v. Diocese of Colo.**, 863 P.2d 310 (Colo. 1993); **Semler v. Hellerstein**, 2016 COA 143, ¶¶ 42–45, 428 P.3d 555 (affirming dismissal of negligent supervision claim where plaintiff failed to allege tortious conduct of employee), *rev'd on other grounds sub nom.* **Bewley v. Semler**, 2018 CO 79, 432 P.3d 582; **Settle v. Basinger**, 2013 COA 18, ¶ 29, 411 P.3d 717 (emergency room physician who treated plaintiff and ordered his transfer by air ambulance to another hospital owed no duty to supervise air ambulance nurses who attempted to intubate plaintiff during flight where physician had no reason to know that the nurses were likely to harm others); **Kahland v. Villarreal**, 155 P.3d 491 (Colo. App. 2006); **Winkler v. Rocky Mountain Conference of United Methodist Church**, 923 P.2d 152 (Colo. App. 1995); **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); **Biel v. Alcott**, 876 P.2d 60 (Colo. App. 1993); *see also* **Loveland ex rel. Loveland v. St. Vrain Valley Sch. Dist. RE-1J**, 2012 COA 112, ¶¶ 29–33, 328 P.3d 228 (negligent supervision claim against school district on behalf of child injured on school playground apparatus barred by Colorado Governmental Immunity Act), *aff'd on other grounds sub nom.* **St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.**, 2014 CO 33, 325 P.3d 1014; **Williams v. Cont'l Airlines, Inc.**, 943 P.2d 10 (Colo. App. 1996) (rejecting employee's tort claim against employer and supervisor for "negligent investigation" where employee accused of sexual assault by another employee sought to recover noneconomic damages for injury to reputation and for mental and emotional suffering).

7. Where a plaintiff seeks to recover against an employer for the negligence of an employee under both negligence and vicarious liability (e.g., respondeat superior) theories, the employer's acknowledgement of vicarious liability for the employee's negligence bars the plaintiff from recovering against the employer on a direct negligence claim, such as negligent hiring, supervision, retention, and entrustment. **Ferrer v. Okbamicael**, 2017 CO 14M, ¶¶ 19, 58, 390 P.3d 836 (adopting the rule announced in **McHaffie v. Bunch**, 891 S.W.2d 822 (Mo. 1995)). This rule does not apply when the plaintiff's injuries are not caused by the employee's negligence, such as when the employer's own negligence caused the injuries. *Id.* at ¶ 34.

### **Negligent Entrustment**

8. For a discussion of the doctrine of "negligent entrustment," see **Casebolt**, 829 P.2d at 355–62, where the court affirmed that the doctrine of negligent entrustment is part of the law of negligence in Colorado and ruled that under this doctrine, a wife whose husband died as a result of driving an automobile while intoxicated could bring a wrongful death action against her husband's employer who had loaned the automobile to the decedent. The court further ruled that evidence that the decedent's employer knew or had reason to know that the decedent was likely to drive the automobile while intoxicated precluded the entry



of summary judgment in favor the employer. *Id.* at 362. In so ruling, the court overruled **Hilberg**, 761 P.2d at 238, and **Hasegawa v. Day**, 684 P.2d 936 (Colo. App. 1983), to the extent that these cases held that an essential element of negligent entrustment was that the entrustor had the ability to control the trustee or the trustee's use of the chattel supplied by the entrustor at the time the negligence of the trustee resulted in injury. The court also held that an entrustee can recover for physical harm to himself or herself that results from a negligent entrustment, and that comparative negligence provides the appropriate framework for examining any negligence on the part of the trustee, including the negligence of a borrower of an automobile who drives the automobile while intoxicated. **Casebolt**, 829 P.2d at 360-61. Other Colorado cases discuss the doctrine of negligent entrustment. See **Ferrer**, 2017 CO 14M, ¶¶ 19, 58 (holding that where an employer acknowledges vicarious liability for its employee's negligence, a plaintiff's direct negligence claims against the employer—such as negligent entrustment—are barred); **Peterson**, 829 P.2d at 377; **Beasley**, 2015 COA 145, ¶¶ 8-28; **Draper**, 282 P.3d at 498-99; **Kahland**, 155 P.3d at 493; **Connes v. Molalla Transp. Sys., Inc.**, 817 P.2d 567 (Colo. App. 1991), *aff'd on other grounds*, 831 P.2d 1316 (Colo. 1992); **Lahey v. Benjou**, 759 P.2d 855 (Colo. App. 1988); **Hilberg**, 761 P.2d at 238-39; **Butcher v. Cordova**, 728 P.2d 388 (Colo. App. 1986); **Hasegawa**, 684 P.2d 936; *see also* **Mid-Century Ins. Co. v. Heritage Drug, Ltd.**, 3 P.3d 461 (Colo. App. 1999) (claim for negligent entrustment not based on vicarious liability); **Liebelt v. Bob Penkhus Volvo-Mazda, Inc.**, 961 P.2d 1147 (Colo. App. 1998) (automobile dealer did not negligently entrust vehicle to uninsured motorist); **Payberg v. Harris**, 931 P.2d 544 (Colo. App. 1996) (bailee cannot be held liable under negligent entrustment theory for returning bailed property to bailor).

### Legislative Duty

9. For a discussion as to when a negligence claim against a governmental entity can be predicated on a duty arising from a legislative enactment, see **State v. Moldovan**, 842 P.2d 220 (Colo. 1992); **Board of County Commissioners v. Moreland**, 764 P.2d 812 (Colo. 1988); **Jefferson County School District R-1 v. Justus**, 725 P.2d 767 (Colo. 1986); **Ferraro**, 2019 COA 123, ¶ 3, 451 P.3d at 1257 (amendments to the Department of Public Health and Environment Regulations, adding single-family residential dwellings to the asbestos regulations, did not create a duty to inspect for asbestos before beginning construction); and **Easton v. 1738 Partnership**, 854 P.2d 1362 (Colo. App. 1993). *See also* § 24-10-106.5, C.R.S. (providing that the adoption of a policy or regulation to protect any person's health or safety shall not give rise to a duty of care on the part of a public entity or public employee where none otherwise existed); **Zapp v. Kukuris**, 847 P.2d 150 (Colo. App. 1992) (duty of police officers to victim struck by stolen car during high speed police chase).

### Expert Testimony

10. Generally, where the defendant is held to a standard of care be-

yond the common knowledge and experience of ordinary persons, expert testimony is required to prove breach of a legal duty. **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997); *see also* **Dunn v. Am. Family Ins.**, 251 P.3d 1232 (Colo. App. 2010); **Hice v. Lott**, 223 P.3d 139 (Colo. App. 2009); **Calvaresi v. Nat'l Dev. Co.**, 772 P.2d 640 (Colo. App. 1988).

### **Construction and Improvements to Real Property**

11. In **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010), the court held that a builder has a duty to use reasonable care and skill in constructing a home, and the failure to do so constitutes negligence. *See also* **Cosmopolitan Homes, Inc. v. Weller**, 663 P.2d 1041 (Colo. 1983) (a subsequent purchaser of a home foreseeably suffers personal injury as a result of a builder's negligence and thus may state a claim for negligence against the builder); **Brooktree Vill. Homeowners Ass'n v. Brooktree Vill., LLC**, 2020 COA 165, ¶ 36, 479 P.3d 86, 95 ("Negligence claims 'require[] that a builder or contractor be held to a standard of reasonable care in the conduct of its duties to the foreseeable users of the property.'" (alteration in original) (quoting **Cosmopolitan Homes**, 663 P.2d at 1045)). However, in **S K Peightal Engineers, LTD**, 2015 CO 7, ¶¶ 18-25, the court held that a commercial entity that acquires a home through a deed in lieu of foreclosure is not a "subsequent" purchaser or homeowner to whom an independent duty of care is owed under **Cosmopolitan Homes**, 663 P.2d at 1044-45.

12. For special pleading and other requirements and limitations in actions or arbitration proceedings against construction professionals "claiming damages, indemnity, or contribution in connection with alleged construction defects, resulting in property loss or damage," see sections 13-20-801 through 13-20-808, C.R.S. (Construction Defect Action Reform Act or "CDARA"). With respect to claims based on negligence, see section 13-20-804, relating to the effect of "substantial compliance with an applicable building code or industry standard." CDARA was originally enacted in 2001, but was amended in 2003 and 2007, with the amendments being applicable to actions filed on or after their effective dates. In May 2010, a new section addressing insurance coverage for construction defect claims was added. *See* § 13-20-808.

13. "An improvement to real property is commonly understood as '[a]n addition to real property, whether permanent or not; esp[ecially] one that increases its value or utility or that enhances its appearance.'" **Barron v. Kerr-McGee Rocky Mtn. Corp.**, 181 P.3d 348, 350 (Colo. App. 2007) (quoting *BLACK'S LAW DICTIONARY* 773 (8th ed. 2004), and discussing workers' compensation immunity for one contracting out work on "improvements"). Under particular facts involving a general contractor's claims against two subcontractors who had worked on the final building in a multi-phase project, an improvement may be a discrete component of an entire project, such as one of multiple residential buildings constructed in a project. **Shaw Constr., LLC v. United**



**Builder Servs., Inc.**, 2012 COA 24, ¶ 38, 296 P.3d 145. The Committee takes no position regarding application of this case to a developer, builder, or other person responsible for the construction or development of a multi-family development as a whole.

14. A construction professional “can be liable for negligence if it fails to follow the recommendations of its independent contractors.” **Hildebrand**, 252 P.3d at 1165.

15. A construction professional’s employee may be personally liable for the construction professional’s negligent conduct if that employee “approved of, directed, actively participated in, or cooperated in” the conduct. *Id.* at 1166; accord **Hoang v. Arbess**, 80 P.3d 863 (Colo. App. 2003).

16. Negligence claims arising out of construction defects are not limited by contractual privity. **Forest City Stapleton Inc. v. Rogers**, 2017 CO 23, ¶ 13, 393 P.3d 487. Rather, foreseeability of harm defines the scope of tort liability. *Id.*

### Imputed Negligence

17. The negligence or contributory negligence of a parent, as a parent, is not imputable to his or her children. **Pub. Serv. Co. v. Petty**, 75 Colo. 454, 226 P. 297 (1924) (citing **Denver City Tramway Co. v. Brown**, 57 Colo. 484, 143 P. 364 (1914)); see also **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008); **Fletcher v. Porter**, 754 P.2d 788 (Colo. App. 1988). Similarly, in the absence of some other basis, such as master and servant, the contributory negligence of one parent or a spouse will not be imputed to the other parent so as to bar or reduce whatever claim the other parent may have for injuries to the child. See **Phillips v. Denver City Tramway Co.**, 53 Colo. 458, 128 P. 460 (1912).

### Exculpatory Releases

18. Exculpatory releases executed by parents on behalf of minor children have been enforced in Colorado. Compare **Hamill v. Cheley Colo. Camps, Inc.**, 262 P.3d 945 (Colo. App. 2011) (enforcing release of minor’s claims for negligence signed by mother because release adequately disclosed extent of potential injuries, was clear and unambiguous, and was fairly entered into by mother), with **Wycoff v. Grace Cmty. Church of Assemblies of God**, 251 P.3d 1260, 1264 (Colo. App. 2010) (declining to enforce release because decision was not voluntary and informed but noting that “parents have a fundamental right to make decisions on behalf of their children, including deciding whether the children should participate in risky activities” (citing § 13-22-107(1)(a)(I)-(V), C.R.S.)).

### Statutory Defenses

19. For the circumstances in which a person may not be entitled to

recover damages sustained while engaged in the commission of, or during immediate flight from, an act constituting a felony, see section 13-80-119, C.R.S. (formerly section 13-80-129, C.R.S.); and **Molnar v. Law**, 776 P.2d 1156 (Colo. App. 1989). Other statutes create defenses to negligence claims or limit potential liability for negligence or the amount of recoverable damages. *See, e.g.*, § 11-58-107, C.R.S. (issuer or public employee of issuer for information or omission in annual report concerning a nonrated public security); § 12-47-801, C.R.S. (sale, service, or provision of alcoholic beverages to an intoxicated person) (the constitutionality of the predecessor to former 12-47-801 was upheld in **Charlton v. Kimata**, 815 P.2d 946 (Colo. 1991), and the statute was interpreted in **Build It & They Will Drink, Inc. v. Strauch**, 253 P.3d 302 (Colo. 2011), and **Rojas v. Engineered Plastic Designs, Inc.**, 68 P.3d 591 (Colo. App. 2003)); § 13-21-108, C.R.S. (immunizing various providers of emergency assistance); § 13-21-108.1, C.R.S. (persons involved in providing emergency assistance using automated external defibrillators); § 13-21-108.2, C.R.S. (providers rendering emergency assistance to person injured while engaged in competitive sports); § 13-21-108.3, C.R.S. (architects, professional engineers, professional land surveyors, and building code officials rendering assistance during declared disaster emergency); § 13-21-108.5, C.R.S. (persons rendering assistance relating to discharges of hazardous materials); § 13-21-108.7, C.R.S. (persons rendering emergency assistance through the administration of an opiate antagonist); § 13-21-113(1), C.R.S. (suppliers donating food to nonprofit organizations for use of poor persons); § 13-21-113.3, C.R.S. (fire departments and other persons or entities donating equipment); § 13-21-115.5, C.R.S. (volunteers, including physicians, acting for a nonprofit organization or corporation or a hospital) (“Volunteer Services Act” was interpreted in **Rieger v. Wat Buddhawararam of Denver, Inc.**, 2013 COA 156, ¶¶ 14-37, 338 P.3d 404); § 13-21-115.6, C.R.S. (liability of school crossing guards limited to willful and wanton conduct when acting within official functions and duties); § 13-21-116(2)(b), C.R.S. (members of boards of directors of nonprofit corporations); § 13-21-116(2.5)(a), C.R.S. (volunteers assisting organizations for young persons); § 13-21-117, C.R.S. (liability of physicians, social workers, and other persons or institutions providing mental health care) (statute interpreted in **Marcellot v. Exempla, Inc.**, 2012 COA 200, ¶¶ 18-31, 317 P.3d 1275); § 13-21-117.5, C.R.S. (providers of service or support to persons with developmental disabilities) (statute interpreted in **McLaughlin v. Oxley**, 2012 COA 114, ¶¶ 11-18, 297 P.3d 1007); § 13-21-117.7, C.R.S. (limited immunity from liability of foster care provider for acts or omissions of foster child in provider’s care); § 13-21-119, C.R.S. (participants engaged in equine and llama activities) (statute interpreted in **Clyncke v. Waneka**, 157 P.3d 1072 (Colo. 2007), and **Culver v. Samuels**, 37 P.3d 535 (Colo. App. 2001)); § 13-21-121 C.R.S. (persons engaged in providing agricultural recreational activities); § 14-10-128.1(7), C.R.S. (parenting time coordinator); § 18-1-704.5(1), (2), (4), C.R.S. (defense of use of physical force, including deadly physical force, against an intruder of a dwelling) (applicability in civil cases never decided); § 24-10-105, C.R.S. (public employees); § 24-10-106.5, C.R.S. (public officials adopting a policy or regulation or conducting an inspec-



tion); § 24-10-118(2), C.R.S. (public employees); § 24-33.5-1505, C.R.S. (public agencies or entities and persons engaged in “emergency planning, service, or response activities regarding a hazardous material release, threat of release, or act of terrorism”); § 37-87-104, C.R.S. (liability of one who owns, controls, or operates a water storage reservoir); § 37-87-115, C.R.S. (immunity of state engineer and staff); § 38-33.3-303(2)(b), C.R.S. (homeowners association executive board members and officers not appointed by declarant are not liable for acts or omissions undertaken as part of their duties, except for willful and wanton acts or omissions) (statute interpreted in **McShane v. Stirling Ranch Prop. Owners Ass’n**, 2015 COA 48, ¶ 18, 411 P.3d 145, *rev’d on other grounds*, 2017 CO 38, 393 P.3d 978; § 42-2-112(3), C.R.S. (physician or optometrist giving certain opinions concerning the competence of others to operate motor vehicles) (formerly § 42-2-110.5(3), C.R.S.); *see also* 42 U.S.C.A. §§ 14501–05 (2018) (volunteers for nonprofit organizations and governmental entities).

20. Notwithstanding the provisions of the comparative negligence statute, § 13-21-111, C.R.S., and the pro rata liability statute, § 13-21-111.5, C.R.S., the assumption of “inherent risks” by a spectator of a professional baseball game may be a complete defense against liability in an action for injuries by a spectator against an owner of a professional baseball team or stadium. *See* § 13-21-120, C.R.S.

21. For a discussion of the impact of the Colorado Ski Safety Act of 1979, §§ 33-44-101, *et seq.*, C.R.S., on the liability of ski area operators for injuries sustained in skiing accidents, *see* **Fleury v. IntraWest Winter Park Operations Corp.**, 2016 CO 41, ¶¶ 12-17, 372 P.3d 349; **Stamp v. Vail Corp.**, 172 P.3d 437 (Colo. 2007); **Graven v. Vail Associates, Inc.**, 909 P.2d 514 (Colo. 1995); **Redden v. Clear Creek Skiing Corp.**, 2020 COA 176, ¶¶ 35–52, 490 P.3d 1063; **Anderson v. Vail Corp.**, 251 P.3d 1125 (Colo. App. 2010); **Ciocian v. Vail Corp.**, 251 P.3d 1130 (Colo. App. 2010); and **Cooper**, 32 P.3d at 509.

### Immunities

22. Of the immunities from liability for ordinary negligence accorded by various statutes, the broadest appears to be that accorded by section 13-21-116(2)(a), C.R.S., the “Good Samaritan” Act. Under that section, some limited immunity is now accorded to all good Samaritans when the person “performs a service or act of assistance, without compensation or expectation of compensation, for the benefit of another person, or adopts or enforces a policy or a regulation to protect another person’s health or safety.” In cases in which this statute may be applicable, this instruction and the definitional instructions accompanying it must be appropriately modified.

23. For cases discussing the common-law doctrine of official immunity that may relieve a public official from personal liability for negligence when making certain decisions, *see* **State v. Mason**, 724 P.2d 1289 (Colo. 1986) (absolute quasi-judicial immunity of parole board

members); and **Leake v. Cain**, 720 P.2d 152 (Colo. 1986) (immunity of police officers when making “discretionary” decisions). *See also* **Whitcomb v. City & Cty. of Denver**, 731 P.2d 749 (Colo. App. 1986). If a public official is not personally liable because of the doctrine of official immunity, then neither is the employing governmental entity. §§ 24-10-105, 24-10-106(2) & (3), C.R.S.; **Ceja v. Lemire**, 154 P.3d 1064 (Colo. 2007); **Mason**, 724 P.2d at 1292; *see also* **Moreland**, 764 P.2d at 818 (county not liable for alleged negligence of employee in not enforcing building code because “before a private civil liability remedy will be recognized for injuries resulting from a breach of obligations legislatively imposed on a governmental entity and unknown at common law, a clear expression of legislative intent must be found”).

24. For a discussion of the applicability and effect of the parental immunity doctrine, see **Terror Mining Co. v. Roter**, 866 P.2d 929 (Colo. 1994) (for willful and wanton misconduct exception to the parental immunity doctrine to apply, conduct must be purposeful and committed without regard to child’s safety). *See also* **Schlessinger v. Schlessinger**, 796 P.2d 1385 (Colo. 1990).

### **Fireman’s Rule**

25. For a discussion of the “fireman’s rule,” which provides that a firefighter or police officer may not recover in tort for injuries caused by the negligent conduct of others, see **Bath Excavating & Construction Co.**, 847 P.2d at 1143-47 (noting that fireman’s rule has not been expressly accepted or rejected in Colorado). *See also* **Banyai v. Arruda**, 799 P.2d 441 (Colo. App. 1990) (rejecting rule); **Rhea v. Green**, 29 Colo. App. 19, 476 P.2d 760 (1970) (rejecting rule by implication). *But see* **Lunt v. Post Printing & Publ’g Co.**, 48 Colo. 316, 110 P. 203 (1910) (classifying firefighter as a licensee and precluding recovery to the firefighter because landowner did not owe duty to licensee to warn of hidden dangers).

## 9:2 NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS—ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligent infliction of emotional distress, you must find all the following have been proved by a preponderance of the evidence:

1. The defendant was negligent;
2. The defendant's negligence created an unreasonable risk of physical harm to the plaintiff;
3. The defendant's negligence caused the plaintiff to be put in fear for (his) (her) own safety and such fear was shown by physical consequences or long continued emotional disturbance, rather than only momentary fright, shock, or other similar and immediate emotional distress; and
4. The plaintiff's fear caused (him) (her) (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have)



**been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. This instruction should be used when the plaintiff is claiming damages for fear of his or her own safety and for the consequential damages (physical and mental) caused by such fright, rather than damages resulting from an “impact” caused by the defendant’s negligence. When the plaintiff is claiming damages for intentional infliction of emotional distress by extreme and outrageous conduct, see Chapter 23, and for assault, see Part A of Chapter 20.

2. Omit any numbered paragraphs, the facts of which are not in dispute.

3. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. Whenever the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs in Instruction 9:22 and that Instruction should then be used in accord with its Notes on Use.

5. Whenever this instruction is given, the appropriate instruction or instructions relating to causation must also be given, *see* Instructions 9:18 to 9:21, as well as other appropriate instructions defining the terms used in this instruction, e.g., Instruction 9:6 (defining “negligence”).

6. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

7. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

### Source and Authority

1. This instruction is supported by **Towns v. Anderson**, 195 Colo. 517, 579 P.2d 1163 (1978); **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (to establish prima facie case of negligent infliction of emotional distress, plaintiff must first show that defendant was negligent); **Slovek v. Board of County Commissioners**, 697 P.2d 781 (Colo. App. 1984)



(though physical impact is not required, to recover damages for negligent infliction of emotional distress, plaintiff must have been subjected to a risk of bodily harm from such negligence), *aff'd*, 723 P.2d 1309 (Colo. 1986); and **Mathews v. Lomas & Nettleton Co.**, 754 P.2d 791 (Colo. App. 1988) (proof of risk of bodily harm required). *See also Webster v. Boone*, 992 P.2d 1183 (Colo. App. 1999) (no recovery for emotional distress on negligence claim in the absence of fraud, malice or other willful and wanton conduct or the creation of an unreasonable risk of bodily harm); **Colwell v. Mentzer Invs., Inc.**, 973 P.2d 631 (Colo. App. 1998) (no recovery unless plaintiff subjected to unreasonable risk of bodily harm); **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Card v. Blakeslee**, 937 P.2d 846 (Colo. App. 1996) (to recover on claim of negligent infliction of emotional distress, plaintiff must be subject to a direct threat of harm or an unreasonable risk of bodily injury); **Kimelman v. City of Colo. Springs**, 775 P.2d 51 (Colo. App. 1988) (no recovery for emotional distress caused by negligent handling of a dead body when plaintiff not personally subjected to a risk of physical harm). *But see Montoya v. Bebensee*, 761 P.2d 285 (Colo. App. 1988) (reversing the trial court's dismissal of a claim for negligent infliction of emotional distress without discussing the requirement that the plaintiff have been subjected to a risk of physical harm).

2. A parent who is not personally subjected to an unreasonable risk of physical harm may not recover for emotional distress caused by witnessing the negligent infliction of physical harm on the parent's child. **Millican v. Wolfe**, 701 P.2d 107 (Colo. App. 1985); *see also Hale v. Morris*, 725 P.2d 26 (Colo. App. 1986) (same, and, in addition, harm that child suffered did not occur in the parent's presence).

3. The firing of an employee because of a disability in violation of the Colorado Anti-Discrimination Act, § 24-34-402, C.R.S., is not sufficient, in and of itself, to support a claim for negligent infliction of emotional distress. **Bigby v. Big 3 Supply Co.**, 937 P.2d 794 (Colo. App. 1996).

4. A claim of negligent infliction of emotional distress describes an independent tort injury suffered by the plaintiff directly; it is not derivative of a third person's personal injury claim. **Draper v. DeFrenchi-Gordineer**, 282 P.3d 489 (Colo. App. 2011) (husband suffering emotional distress after witnessing automobile accident in which wife was injured was able to maintain claim of negligent infliction of emotional distress against driver who caused the accident notwithstanding wife's settlement of her personal injury claim against driver).

### **9:3 NEGLIGENT MISREPRESENTATION CAUSING PHYSICAL HARM—ELEMENTS OF LIABILITY**

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligent misrepresentation, you must find all of the following have been proved by a preponderance of the evidence:**

- 1. The defendant negligently gave false information to the plaintiff;**
- 2. The plaintiff relied upon such information; and**
- 3. This reliance was a cause of physical harm to the (person) (property) of the plaintiff.**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### **Notes on Use**

1. This instruction should be used when the plaintiff is claiming

damages for physical injury to the plaintiff's person or property caused by the plaintiff's or, with this instruction appropriately modified, a third person's reliance on information negligently provided by the defendant.

2. Omit any numbered paragraphs, the facts of which are not in dispute.

3. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. For the tort of negligent misrepresentation causing financial loss in a business transaction, see Instruction 9:4. Unlike that tort, the tort of negligent misrepresentation causing physical harm is not limited to persons whose business or profession is that of giving information dealing with the safety of others. Also, the defendant can be held liable for physical injuries caused by a negligent misrepresentation even though the false information was given on a purely gratuitous basis. RESTATEMENT (SECOND) OF TORTS § 311 cmts. b-c (1965). Similarly, a defendant can be held liable under this instruction even though the plaintiff was not the person to whom the false information was communicated, nor was the person who was intended to rely on the information. *Id.* at cmt. f (incorporating by reference RESTATEMENT § 310 cmts. c-d). In these latter circumstances, this instruction must be appropriately modified.

5. The unreasonable reliance of the plaintiff on the misrepresentation of the defendant constitutes contributory negligence on which, because it is an affirmative defense, the defendant has the burdens of pleading and proof. Consequently, whenever the defense of contributory negligence has been properly raised in the form of unreasonable reliance or in any other form, the beginning unnumbered paragraph as well as the numbered paragraphs of this instruction should be substituted for the beginning unnumbered and numbered paragraphs in Instruction 9:22 and that Instruction should then be used in accord with its Notes on Use.

6. Though mitigation of damages is an affirmative defense, see Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. Whenever this instruction is given, the appropriate instruction or instructions relating to causation must also be given, see Instructions 9:18 to 9:21, as well as other appropriate instructions defining the terms used in this instruction, e.g., Instruction 9:6 (defining "negligence").

8. This instruction should not be used when liability has been



admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

### Source and Authority

1. This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982) (recognizing tort of negligent misrepresentation causing physical harm, as set out in RESTATEMENT (SECOND) OF TORTS § 311 (1965)); and **Greene v. Thomas**, 662 P.2d 491 (Colo. App. 1982) (insufficient evidence that any damages caused by reliance). *See also* Source and Authority to Instruction 9:1.

2. To recover on a claim for negligent misrepresentation, a plaintiff must show that the defendant owed the plaintiff a duty of care. **Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.**, 952 P.2d 768 (Colo. App. 1997) (dentist, who allegedly made false representations in book and on television program regarding effect of “dental amalgams” on health of dental patients, had no duty to plaintiff as member of general public).

## **9:4 NEGLIGENT MISREPRESENTATION CAUSING FINANCIAL LOSS IN A BUSINESS TRANSACTION—ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligent misrepresentation, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant gave false information to the plaintiff;

2. The defendant gave such information to the plaintiff in the course of (the defendant's [business] [profession] [employment]) (a transaction in which the defendant had a financial interest);

3. The defendant gave the information to the plaintiff for the (guidance) (use) of the plaintiff in a business transaction;

4. The defendant was negligent in obtaining or communicating the information;

5. The defendant gave the information with the intent or knowing that (the plaintiff) (a limited group of persons of which the plaintiff was a member) would (act) (or) (decide not to act) in reliance on the information;

6. The plaintiff relied on the information supplied by the defendant; and

7. This reliance on the information supplied by the defendant caused damage to the plaintiff.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these

*(number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim]).*

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### **Notes on Use**

1. This instruction rather than Instruction 19:1 should be used when the plaintiff's claim is that, while the defendant may have had an honest belief in the truth of what the defendant represented, the defendant was negligent in arriving at such belief or was negligent in the manner in which the defendant communicated it, thus creating a false impression of the true facts in the mind of the plaintiff. When the negligently given false information results in physical harm to the plaintiff's person or property, rather than causing a financial loss to the plaintiff in a business transaction, Instruction 9:3 should be used rather than this instruction. In several respects, the tort covered by this instruction is more akin to the tort of "fraud" or intentional deceit (Instruction 19:1) than it is to the tort of negligent misrepresentation resulting in physical harm (Instruction 9:3). See RESTATEMENT (SECOND) OF TORTS § 311 cmts. a-c (1965); RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977).

2. Omit any numbered paragraphs, the facts of which are not in dispute.

3. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

4. In cases where the defendant did not give the information directly to the plaintiff, the first three numbered paragraphs of this instruction must be appropriately modified.

5. Whenever the defense of contributory negligence has been properly raised in the form of unreasonable reliance or in any other



form, the beginning unnumbered paragraph as well as the numbered paragraphs of this instruction should be substituted for the beginning unnumbered and numbered paragraphs in Instruction 9:22 and that Instruction should then be used in accord with its Notes on Use. For the definition of the claimed negligence of the defendant, Instruction 9:6 should be used. For the definition of the claimed contributory negligence of the plaintiff, Instruction 9:5 should be used if that claimed negligence is in the form of unreasonable reliance. If the claimed contributory negligence is in any other form, Instruction 9:6 should be used to define the negligence of both parties.

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. This instruction, appropriately modified, may also be used in cases in which it is claimed the defendant was under a public duty to give information and did so negligently. RESTATEMENT (SECOND) OF TORTS § 552(3) (1977).

8. This instruction should not be used when liability has been admitted, *see* Instruction 2:4, or when the court has directed a verdict as to liability, *see* Instruction 2:6.

### Source and Authority

1. This instruction is supported by **First National Bank in Lamar v. Collins**, 44 Colo. App. 228, 616 P.2d 154 (1980) (applying RESTATEMENT (SECOND) OF TORTS § 552 (1977)); **Robinson v. Poudre Valley Federal Credit Union**, 654 P.2d 861 (Colo. App. 1982); and **Fitzgerald v. Edelen**, 623 P.2d 418 (Colo. App. 1980). *See also* **Van Winkle v. Transamerica Title Ins. Co.**, 697 P.2d 784 (Colo. App. 1984) (no liability for negligent failure to disclose in absence of duty to disclose); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS** § 107, at 745-48 (5th ed. 1984); **2 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS** § 7.6 (3rd ed. 2006). The decisions of the court of appeals in **Collins** and **Fitzgerald** were cited by analogy with approval by the supreme court in **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982). Later cases also provide support. *See* **Keller v. A.O. Smith Harvestore Prods., Inc.**, 819 P.2d 69 (Colo. 1991); **Hildebrand v. New Vista Homes II, LLC**, 252 P.3d 1159 (Colo. App. 2010) (affirming judgment on negligent misrepresentation claim against builder and its principal arising from misrepresentation that basement was suitable as a finished living space without a structural floor); **Mullen v. Allstate Ins. Co.**, 232 P.3d 168 (Colo. App. 2009) (affirming summary judgment on claim for negligent misrepresentation by omission because insurer was not obligated to provide information about other types of coverage); **Platt v.**

**Aspenwood Condo. Ass'n, Inc.**, 214 P.3d 1060 (Colo. App. 2009) (allegations of misrepresentations of status of homeowners vote sufficient to withstand motion to dismiss); **Fluid Tech., Inc. v. CVJ Axles, Inc.**, 964 P.2d 614 (Colo. App. 1998) (allegation that information was provided in course of defendant's business was sufficient to withstand motion to dismiss); **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993); **Burman v. Richmond Homes Ltd.**, 821 P.2d 913 (Colo. App. 1991); **Ebrahimi v. E.F. Hutton & Co.**, 794 P.2d 1015 (Colo. App. 1989) (distinguishing between the tort of negligent misrepresentation and tort of deceit).

2. A claim for negligent misrepresentation can be based only on misrepresentation of an existing fact. **Branscum v. Am. Cmty. Mut. Ins. Co.**, 984 P.2d 675, 680 (Colo. App. 1999) (claim for negligent misrepresentation "cannot be based solely on the nonperformance of a promise to do something at a future time" (citing **High Country Movin', Inc. v. U.S. W. Direct Co.**, 839 P.2d 469 (Colo. App. 1992))); *see also* **Colo. Pool Sys., Inc. v. Scottsdale Ins. Co.**, 2012 COA 178, ¶ 72, 317 P.3d 1262 (while expressions of opinion cannot support a negligent misrepresentation claim, liability for negligent misrepresentation may arise when a statement of opinion involves mixed statements of law and fact); **Colo. Coffee Bean, LLC v. Peaberry Coffee, Inc.**, 251 P.3d 9 (Colo. App. 2010); **Bedard v. Martin**, 100 P.3d 584 (Colo. App. 2004).

3. A claim for negligent misrepresentation can be based on false information that the defendant gave the plaintiff for use in a business transaction between the plaintiff and the defendant. *See, e.g.*, **Keller**, 819 P.2d at 72 (contracting party's negligent misrepresentation of material facts prior to execution of agreement may provide basis for independent tort claim); **Collins**, 44 Colo. App. at 230, 616 P.2d at 155-56 (allegations that plaintiff relied on negligent misrepresentations of representative of defendant in entering into contract with the defendant stated claim for negligent misrepresentation in a business transaction).

### **Manufacturer's Liability**

4. For a discussion of a manufacturer's liability to a buyer for negligent misrepresentations made during the course of a sale of its product, *see* **Keller**, 819 P.2d at 72-74 (clause in integrated sales agreement that specifically disclaimed reliance on representations made prior to agreement's execution did not preclude finding that buyer relied on such representations). *Accord* **A.O. Smith Harvestore Prods., Inc. v. Kallsen**, 817 P.2d 1038 (Colo. 1991).

### **Attorney Liability**

5. For a discussion as to when an attorney may be liable to a non-client for negligent misrepresentation, *see* **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 35, 364 P.3d 872 (attorney's liability to non-client is limited to narrow circumstances in which attorney committed fraud or a malicious or tortious act, including negligent



misrepresentation). *See also Allen v. Steele*, 252 P.3d 476 (Colo. 2011) (attorney who negligently misrepresented statute of limitations to non-client was not liable because an initial consultation for a potential civil lawsuit is not a “business transaction,” a necessary element of the claim); **Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.**, 892 P.2d 230 (Colo. 1995) (attorney who issues an opinion letter to client for purpose of inducing non-client to rely thereon in business transaction may be liable to non-client for negligent misrepresentation); **Zimmerman v. Dan Kamphausen Co.**, 971 P.2d 236 (Colo. App. 1998) (attorney owed duty to third party to whom he issued opinion letter); **First Interstate Bank of Denver, N.A. v. Berenbaum**, 872 P.2d 1297 (Colo. App. 1993).

### **Information Given to Third Party**

6. A defendant may be liable for negligent misrepresentation even though the defendant did not give the information directly to the plaintiff. It is sufficient if the defendant gave the information to a third person knowing that the third person intended to supply it to and use it to influence the plaintiff or a limited group of persons of which the plaintiff was a member. **Hildebrand**, 252 P.3d at 1168 (“‘direct communication of the information to the person acting in reliance upon it is not necessary’” (quoting RESTATEMENT (SECOND) OF TORTS § 552 cmt. g (1977))); *see also Jimerson v. First Am. Title Ins. Co.*, 989 P.2d 258 (Colo. App. 1999) (recognizing rule, but holding that to impose liability on supplier of information, third-party’s reliance on that information must have been justifiable); **DCB Constr. Co. v. Cent. City Dev. Co.**, 940 P.2d 958 (Colo. App. 1996) (privity not required as element of negligent misrepresentation claim), *aff’d on other grounds*, 965 P.2d 115 (Colo. 1998); **Galie v. RAM Assocs. Mgmt. Servs., Inc.**, 757 P.2d 176 (Colo. App. 1988) (privity between plaintiff and defendant not required); **Wolther v. Schaarschmidt**, 738 P.2d 25 (Colo. App. 1986) (same); *see generally Campbell v. Summit Plaza Assocs.*, 192 P.3d 465 (Colo. App. 2008) (reaffirming **Jimerson**, 989 P.2d 258, and holding that because title insurer owes no contractual obligation to a vendor of real property by virtue of the title commitment or title insurance policy issued to the buyer, vendor may not enforce obligations established by the title commitment and claim negligence in title insurer’s performance).

### **Reasonable Reliance**

7. The unreasonable reliance of the plaintiff on the misrepresentation of the defendant constitutes contributory negligence for which, because it is an affirmative defense, the defendant has the burdens of pleading and proof. *See* RESTATEMENT (SECOND) OF TORTS § 552A (1977). In addition, the defense requires the application of an objective test. **Robinson**, 680 P.2d at 243. Thus, the defense applies even though the plaintiff’s unreasonable reliance may otherwise have been “justifiable” in terms of what a person of comparable intelligence, education and experience to that of the plaintiff would have done. *Id.*; C.R.C.P. 8(c); RESTATEMENT § 552A.



8. Although unreasonable reliance may be considered a form of contributory or comparative negligence and treated as an affirmative defense, in a number of cases, the Colorado Court of Appeals has indicated that “justifiable” reliance is an element of a plaintiff’s claim. *See, e.g., Colo. Pool Sys., Inc.*, 2012 COA 178, ¶¶ 59-63 (insured cannot justifiably rely on oral statement of insurance agent about insurance coverage if the insured has a copy of the policy and can see that the oral misrepresentation contradicts express, unambiguous terms of the policy, but case remanded for further proceedings because the policy term was ambiguous); **Colo. Coffee Bean, LLC**, 251 P.3d at 19 (reliance on franchisor’s general description of business model not justifiable in light of exculpatory clauses in transactional documents and the absence of any specific affirmative misrepresentation); **Sheffield Servs. Co. v. Trowbridge**, 211 P.3d 714 (Colo. App. 2009) (analyzing inquiry notice, the sophistication of the investor, and the parties’ relative access to the facts to determine whether reliance was justifiable), *overruled on other grounds by* **Weinstein v. Colborne Foodbotics, LLC**, 2013 CO 33, 302 P.3d 263; **Campbell v. Summit Plaza Assocs.**, 192 P.3d 465 (Colo. App. 2008); **Nelson v. Gas Research Inst.**, 121 P.3d 340 (Colo. App. 2005); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); **Branscum v. Am. Cmty. Mut. Ins.**, 984 P.2d 675 (Colo. App. 1999).

### **Damages**

9. Damages are an essential element of a claim for negligent misrepresentation causing financial loss in a business transaction. **W. Cities Broad., Inc. v. Schueller**, 849 P.2d 44 (Colo. 1993); **DC-10 Entm’t, LLC v. Manor Ins. Agency, Inc.**, 2013 COA 14, ¶ 7, 308 P.3d 1223.

10. The proper measure of damages for a negligent representation causing financial loss is the “out of pocket” rule rather than the “out of bargain” rule. **Ballow v. PHICO Ins. Co.**, 878 P.2d 672 (Colo. 1994); **W. Cities Broad., Inc.**, 849 P.2d at 49; **Harrison v. Smith**, 821 P.2d 832 (Colo. App. 1991); **Robinson**, 654 P.2d at 863 (citing with approval § 552B(1) of RESTATEMENT (SECOND) OF TORTS (1977)). A damage instruction based on section 552B(1) should therefore be given with this instruction rather than Instruction 19:17. *See also* RESTATEMENT § 552B(2) (specifically excluding from the recoverable damages “the benefit of the plaintiff’s contract with the defendant”).

## 9:5 NEGLIGENT MISREPRESENTATION CAUSING FINANCIAL LOSS IN A BUSINESS TRANSACTION—UNREASONABLE RELIANCE—DEFINED

One is negligent in relying on information given by another when a reasonable person in the same or similar circumstances would not have so relied.

### Notes on Use

1. This instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:4 for the definition of the plaintiff's negligence when the affirmative defense of contributory negligence in the form of unreasonable reliance on the part of the plaintiff has been properly raised. See Note 5 of the Notes on Use to Instruction 9:4.

2. There is authority for the proposition that if the plaintiff has access to information that would have led to the discovery of the facts and that information was equally available to both parties, then plaintiff's reliance is not justified or reasonable as a matter of law. See **Bedard v. Martin**, 100 P.3d 584 (Colo. App. 2004); **Balkind v. Telluride Mtn. Title Co.**, 8 P.3d 581 (Colo. App. 2000); see also **M.D.C./Wood, Inc. v. Mortimer**, 866 P.2d 1380 (Colo. 1994). However, for a different test, see the cases and authorities cited in the Source and Authority to Instructions 19:8 to 19:10 (justifiable reliance).

### Source and Authority

This instruction is supported by **Robinson v. Poudre Valley Federal Credit Union**, 654 P.2d 861 (Colo. App. 1982); and RESTATEMENT (SECOND) OF TORTS § 552A (1977).

## 9:6 NEGLIGENCE—DEFINED (INCLUDING ASSUMPTION OF THE RISK AND COMPARATIVE NEGLIGENCE CASES)

Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, under the same or similar circumstances to protect (oneself or) others from (bodily injury) (death) (property damage) (*insert any other appropriate description, e.g., "financial loss"*).

(Negligence may also mean assumption of risk. A person assumes the risk of injury or damage if the person voluntarily or unreasonably exposes [himself] [herself] to such injury or damage with knowledge or appreciation of the danger and risk involved.)

### Notes on Use

1. Use whichever parenthesized phrases in the first paragraph are appropriate. In particular, whenever the defense of contributory negligence has been raised and is being submitted to the jury under the appropriate comparative negligence instructions, *see* Instructions 9:22–9:26, the parenthesized words “oneself or” should be used.

2. In Colorado, assumption of risk is a form of contributory negligence. For this reason, a separate instruction on the defense of assumption of risk should not be given in a case governed by the comparative negligence statute, § 13-21-111, C.R.S. *See, e.g., Brown v. Kreuser*, 38 Colo. App. 554, 560 P.2d 105 (1977). “Instructions on [contributory negligence and on] determining [the] comparative negligence percentages of the plaintiff and [the] defendant [Instructions 9:22–9:27] sufficiently cover the conduct heretofore classed as assumption of risk in Colorado. . . .” *Id.* at 558, 560 P.2d at 108; *see also Loup-Miller v. Brauer & Assocs.-Rocky Mtn., Inc.*, 40 Colo. App. 67, 572 P.2d 845 (1977); *Stefanich v. Martinez*, 39 Colo. App. 500, 570 P.2d 554 (1977), *aff’d on other grounds*, 195 Colo. 341, 577 P.2d 1099 (1978). The parenthesized second paragraph of this instruction should be given only in comparative negligence cases governed by section 13-21-111, in which there is sufficient evidence to support it. *See, e.g., Warembourg v. Excel Elec., Inc.*, 2020 COA 103, ¶ 105, 471 P.3d 1213 (court may instruct the jury on the assumption of risk defense if the facts of the case support giving the instruction, but instruction should not be given if the evidence does not show that the plaintiff knew of the danger or consented to it); *Laughman v. Girtakovskis*, 2015 COA 143, ¶ 25, 374 P.3d 504 (“the assumption of risk statute applies when the jury is



required to apportion negligence”); **Vititoe v. Rocky Mountain Pavement Maint., Inc.**, 2015 COA 82, ¶¶ 70-75, 412 P.3d 767 (evidence that plaintiff motorcyclist voluntarily accelerated toward truck in front of him moments before colliding with rear end of truck supported instruction containing assumption of risk language); **Winkler v. Rocky Mtn. Conference of United Methodist Church**, 923 P.2d 152 (Colo. App. 1995) (insufficient evidence of assumption of risk or fault on part of plaintiff to warrant comparative negligence instruction); **Carter v. Lovelace**, 844 P.2d 1288 (Colo. App. 1992) (distinguishing assumption of risk as a form of contributory negligence and concluding that evidence was insufficient to support instruction on assumption of risk).

3. In a professional malpractice case, when the claimed contributory negligence of a plaintiff relates only to the plaintiff’s failure, as a patient or a client, to do what a reasonable patient or client would or would not do with regard to the services being rendered by defendant, Instruction 15:6 or Instruction 15:24, whichever is appropriate, should be used for the definition of contributory negligence rather than this instruction. When a hospital admits a person into its custody who the hospital knows is actively suicidal, and when the admission is for the purpose of preventing that person’s self-destructive behavior, the hospital assumes a duty to use reasonable care in preventing the patient from engaging in such behavior, and this duty subsumes any fault attributable to the plaintiff for harm suffered as a result of those self-destructive acts. In such circumstances, the defenses of comparative negligence or assumption of risk of the patient are inapplicable. *See P.W. v. Children’s Hosp. Colo.*, 2016 CO 6, ¶ 25, 364 P.3d 891.

4. This instruction should not be used where the standard of care required of a person is greater than that normally required in a negligence case. *See, e.g.*, Instruction 9:7. For cases involving children, see Instruction 9:9.

5. In automobile accident cases, the failure to comply with the mandatory seat belt law is admissible to mitigate “pain and suffering” damages. *See* Instruction 5:3 as to the effect of an injured party’s failure to wear a safety belt in an automobile accident case. However, an injured party’s failure to have worn an available seat belt does not constitute negligence. **Fischer v. Moore**, 183 Colo. 392, 517 P.2d 458 (1973) (events occurring before the effective date of the Comparative Negligence Statute, § 13-21-111); **Churning v. Staples**, 628 P.2d 180 (Colo. App. 1981) (events occurring after the adoption of the Comparative Negligence Statute). Similarly, the failure to wear a helmet while riding a motorcycle does not constitute negligence. **Dare v. Sobule**, 674 P.2d 960 (Colo. 1984); **Lawrence v. Taylor**, 8 P.3d 607 (Colo. App. 2000). If the jury learns that a motorcyclist was not wearing a helmet, a limiting instruction may be required. **Vititoe**, 2015 COA 82, ¶ 19.

### Source and Authority

1. This instruction is supported by **Lyons v. Nasby**, 770 P.2d 1250

(Colo. 1989); **Matt Skorey Packard Co. v. Canino**, 142 Colo. 411, 350 P.2d 1069 (1960); **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954); **Hogue v. Colo. & S. Ry.**, 110 Colo. 552, 136 P.2d 276 (1943); **Bedee v. Am. Med. Response**, 2015 COA 128, ¶ 24, 361 P.3d 1083; **Vititoe**, 2015 COA 82, ¶¶ 61, 70; **Winkler v. Shaffer**, 2015 COA 63, ¶ 16, 356 P.3d 63; and **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 266 P.3d 412 (Colo. App. 2011). *See also* RESTATEMENT (SECOND) OF TORTS §§ 282-84 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984).

2. Contributory negligence has also been defined in similar terms by the Colorado courts in **Burr v. Green Brothers Sheet Metal, Inc.**, 159 Colo. 25, 409 P.2d 511 (1966); **King Soopers, Inc. v. Mitchell**, 140 Colo. 119, 342 P.2d 1006 (1959); **Peterson v. Kessler**, 135 Colo. 102, 308 P.2d 610 (1957); **Wilson v. Hill**, 103 Colo. 409, 86 P.2d 1084 (1939); **Colorado & S. Ry. v. Honaker**, 92 Colo. 239, 19 P.2d 759 (1933); **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988); **Lannon v. Taco Bell, Inc.**, 708 P.2d 1370, 1372 (Colo. App. 1985) (“A party has a duty to refrain from acts or omissions to act which may contribute to the totality of acts which cause injury to him.”), *aff’d on other grounds*, 744 P.2d 43 (Colo. 1987); and **Fay v. Kroblin Refrigerated Xpress, Inc.**, 644 P.2d 68 (Colo. App. 1981). *See also* RESTATEMENT (SECOND) OF TORTS § 464 (1965); PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, at § 65.

3. The term comparative negligence has been defined as “a failure to do an act that a reasonably careful person would do, or the doing of an act that a reasonably careful person would not do, under the same or similar circumstances, to protect oneself from bodily injury.” **Reid v. Berkowitz**, 2013 COA 110M, ¶ 54, 315 P.3d 185.

4. For the substantive definition of assumption of risk, as a form of contributory negligence, set out in the parenthesized second paragraph of this instruction, see section 13-21-111.7, C.R.S. *See also* **Harris v. The Ark**, 810 P.2d 226 (Colo. 1991) (statutory definition of assumption of risk as a form of contributory negligence not unconstitutionally vague or otherwise a violation of due process or of equal protection).

5. For a discussion of the distinction between negligent and intentional conduct, see **Cisneros v. Elder**, 2020 COA 163M, ¶¶ 25–26, 490 P.3d 985 (*cert. granted* May 24, 2021); **Wells Fargo Realty Advisors Funding, Inc. v. Uioli, Inc.**, 872 P.2d 1359 (Colo. App. 1994).

6. To the extent one or more forms of contributory negligence may be a partial defense to a product liability claim based on negligence, see section 13-21-406, C.R.S.

7. In a comparative negligence case, if the court directs a finding or verdict of negligence against one or more of the parties, the court must also instruct the jury as to the conduct on which such finding is based,

as well as any other conduct the jury could reasonably find constituted negligence, in order to permit the jury to make a proper comparison of such negligence with any negligence of other parties the jury may find. **Ricklin v. Smith**, 670 P.2d 1239 (Colo. App. 1983).

8. Under the comparative negligence statute, a special instruction on momentary negligence or justifiable distraction is improper. **Rodriguez v. Morgan County R.E.A., Inc.**, 878 P.2d 77 (Colo. App. 1994).

9. When the parties to a negligence action are part of an industry that conforms to well-established safety practices or customs, those practices or customs may be considered by the jury as non-conclusive evidence of the standard of reasonable care that the defendant should have followed. **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002) (admission of Occupational Safety and Health Act regulations as some, non-conclusive, evidence of the standard of care in the relevant industry). See also **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997); **Yampa Valley Elec. Ass'n v. Telecky**, 862 P.2d 252 (Colo. 1993); **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998); **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993).



## 9:7 NEGLIGENCE—DEFINED—INHERENTLY DANGEROUS ACTIVITIES

One carrying on an inherently dangerous activity such as the (*insert an appropriate description, e.g., “transmission of electricity”*) must exercise the highest possible degree of skill, care, caution, diligence, and foresight with regard to that activity, according to the best technical, mechanical, and scientific knowledge and methods which are practical and available at the time of the claimed conduct which caused the claimed injury. The failure to do so is negligence.

### Notes on Use

1. This instruction should be used, rather than Instruction 9:6, to define “negligence,” when, because of the inherently dangerous nature of the activity, a higher standard of care is required than that required for most activities. **Fed. Ins. Co. v. Pub. Serv. Co.**, 194 Colo. 107, 570 P.2d 239 (1977) (applying the rule to the transmission of electricity); *accord* **City of Fountain v. Gast**, 904 P.2d 478 (Colo. 1995); **Yampa Valley Elec. Ass’n v. Telecky**, 862 P.2d 252 (Colo. 1993); **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998); **Mladjan v. Public Serv. Co.**, 797 P.2d 1299 (Colo. App. 1990); *see also* **Blueflame Gas, Inc. v. Van Hoose**, 679 P.2d 579 (Colo. 1984) (by implication, sale and distribution of propane gas is an inherently dangerous activity, and requires the highest degree of care with respect to effective odorization of propane to detect leaks); **U.S. Fid. & Guar. Co. v. Salida Gas Serv. Co.**, 793 P.2d 602 (Colo. App. 1989) (supplying propane gas an inherently dangerous activity); **Hartford Fire Ins. Co. v. Pub. Serv. Co.**, 676 P.2d 25 (Colo. App. 1983) (transmission of natural gas is not abnormally dangerous activity giving rise to strict liability, but court does not discuss whether such activity may be an “inherently dangerous” activity); **Kulik v. Pub. Serv. Co.**, 43 Colo. App. 139, 605 P.2d 475 (1979) (even assuming transmission of natural gas is an “inherently dangerous” activity, loss caused by defective steam pressure safety release valve on gas-fired boiler is not, under this instruction, chargeable to the activity of transmitting natural gas), *aff’d on other grounds*, 621 P.2d 313 (Colo. 1980).

2. This instruction does not apply to “ultrahazardous” or “abnormally dangerous” activities to which a rule of strict liability is applicable. *See* **W. Stock Ctr., Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

3. The rule of this instruction applies only to those aspects of an activity which make it “inherently dangerous.”

4. The Colorado Court of Appeals has referred to “contact” sports

generally and martial arts sparring contests specifically as “inherently dangerous” sporting activities. **Laughman v. Girtakovskis**, 2015 COA 143, ¶¶ 19-20, 374 P.3d 504. The use of the phrase “inherently dangerous” in cases involving contact sports should not be confused with the “inherently dangerous” activities doctrine that is the subject of this instruction.

5. Where reasonable minds would agree that the defendant is engaged in an activity that poses a high risk of injury to others, the court, as a matter of law, may instruct the jury to hold the defendant to the highest standard of care. **Imperial Distribution Servs., Inc. v. Forrest**, 741 P.2d 1251 (Colo. 1987); *see also* **W. Stock Ctr., Inc.**, 195 Colo. at 378–79, 578 P.2d at 1050–51. However, where reasonable minds could disagree as to the degree of risk associated with the activity at issue, as determined by the level of the activity’s dangerousness and the public’s ability to recognize and guard against the risks, it may be proper to instruct the jury on the reasonable person standard and leave for the jury to decide what degree of care a reasonable person would have used under the circumstances. **Imperial Distribution Servs., Inc.**, 741 P.2d at 1256. The better practice may be to instruct the jury, in addition to the traditional reasonable care instruction, that the degree of care that constitutes reasonable care in a particular case increases in proportion to the degree of risk associated with the particular activity. *Id.* at n.7 (citing **Blueflame Gas, Inc.**, 679 P.2d 587–88).

6. Because not all inherently dangerous activities give rise to a heightened duty of care, distinctions among different kinds of inherently dangerous activities may be necessary. *Compare* **Federal Ins. Co. v. Public Serv. Co.**, 194 Colo. 107, 570 P.2d 239 (1977) (imposing strict liability on electrical transmission utility because of inherently dangerous properties of electrical energy), *with* **Huddleston v. Union Rural Elec. Ass’n**, 841 P.2d 282 (Colo. 1992) (transporting persons in single-engine plane over mountains may be “inherently dangerous” activity for purposes of imposing vicarious liability on employer of independent contractor; no mention of heightened duty of care). Where the vicarious liability of an employer for its independent contractor’s ultrahazardous activities is at issue, *see* Note on Use 4 to Instruction 9:7A; where the vicarious liability of an employer for its independent contractor’s inherently dangerous activities is at issue, *see* **Huddleston**, 841 P.2d at 287.

7. Certain activities are so inherently dangerous as to be deemed ultrahazardous or abnormally dangerous, resulting in the imposition of strict liability for damages caused by such activities. *See* **Bennett**, 969 P.2d at 764 (distinguishing ultrahazardous from inherently dangerous activities); **W. Stock Ctr., Inc.**, 195 Colo. at 379, 578 P.2d at 1050 (same). In such cases, Instruction 9:7A should be given instead of this Instruction 9:7.

### Source and Authority

1. This instruction is supported by **Federal Insurance Co.**, 194



Colo. at 111, 570 P.2d at 241-42; **Blankette v. Public Serv. Co.**, 90 Colo. 456, 10 P.2d 327 (1932); **Denver Consolidated Electric Co. v. Lawrence**, 31 Colo. 301, 73 P. 39 (1903); and **Denver Consolidated Electric Co. v. Simpson**, 21 Colo. 371, 41 P. 499 (1895). *See also* **Smith v. Home Light & Power Co.**, 734 P.2d 1051 (Colo. 1987) (for purposes of strict liability in tort for a defective product, electricity is not a “product” that has been “sold” or put “in the stream of commerce,” at least not until it reaches the point where it has been made available for use by the consumer); **Kedar v. Pub. Serv. Co.**, 709 P.2d 15 (Colo. App. 1985) (citing this instruction with approval).

2. It is for the court to determine whether a particular activity is “inherently dangerous” and consequently within the scope of this instruction. **Imperial Distribution Servs., Inc.**, 741 P.2d at 1254; **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985). *But see* **Huddleston**, 841 P.2d at 286 (whether transporting persons in single-engine plane over mountains was an “inherently dangerous” activity for purposes of imposing vicarious liability on employer of independent contractor was a factual question for jury to determine). For discussions of the factors to be considered in determining whether an activity is subject to the higher standard required by this instruction, *see* **Imperial Distribution Servs., Inc.**, 741 P.2d at 1255-56; **Minto v. Sprague**, 124 P.3d 881 (Colo. App. 2005); and **Mannhard v. Clear Creek Skiing Corp.**, 682 P.2d 64 (Colo. App. 1983). *See also* **W. Stock Ctr., Inc.**, 195 Colo. at 378-79, 578 P.2d at 1050; **Trinity Universal Ins. Co. v. Streza**, 8 P.3d 613 (Colo. App. 2000) (in negligence action arising out of explosion of propane heater, where alleged tortfeasor was not engaged in business of supplying propane gas, trial court did not err in refusing to instruct jury on elements of inherently dangerous activities); **Walcott v. Total Petroleum, Inc.**, 964 P.2d 609 (Colo. App. 1998) (dispensing gasoline at a service station not an ultrahazardous activity); **Melton v. Larrabee**, 832 P.2d 1069 (Colo. App. 1992) (installation of heat-tape around water pipe was not an “inherently dangerous” activity).

3. The duty of a ski lift operator to exercise the highest degree of care commensurate with lift’s practical operation was not preempted or abrogated by the enactment of either the Colorado Passenger Tramway Act, §§ 25-5-701 to -720, C.R.S., or the Colorado Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S. **Bayer v. Crested Butte Mtn. Resort, Inc.**, 960 P.2d 70 (Colo. 1998).

4. Ambulance driver owes passenger ordinary duty of care, not the duty to exercise the highest degree of care, when the ambulance is traveling at normal speeds in a nonemergency situation, and the passenger was wearing a seat belt. **Bedee v. Am. Med. Response**, 2015 COA 128, ¶ 30, 361 P.3d 1083.



## 9:7A ULTRAHAZARDOUS ACTIVITIES RESULTING IN STRICT LIABILITY

**For the plaintiff, (*name*), to recover from the defendant (*name*), on (his) (her) (its) claim of ultrahazardous activity liability, you must find that both of the following have been proved by a preponderance of the evidence:**

- 1. The plaintiff has (injuries) (damages) (losses);**
- 2. The defendant's (*insert description of ultrahazardous activity*) was a cause of plaintiff's (injuries) (damages) (losses).**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

### Notes on Use

1. This instruction should be used when, because of the uniquely inherently dangerous nature of the activity, strict liability is imposed for damages caused by such activities. See **Garden of the Gods Village, Inc. v. Hellman**, 133 Colo. 286, 294 P.2d 597 (1956) (imposing strict liability for property damage caused by blasting activities); **Cass Co.-Contractors v. Colton**, 130 Colo. 593, 279 P.2d 415 (1955) (same);

*cf.* §§ 13-21-105 (imposing strict liability on any person who sets fire to any woods or prairie); 40-27-103 (imposing strict liability on railroads for injury to running-at-large livestock due to failure to fence roads); 40-30-103 (imposing strict liability on railroad companies for all damages by fires set out or caused by operating any railroad line); 42-20-509, C.R.S. (imposing strict liability for release of nuclear material during material's transport); **Garnet Ditch & Reservoir Co. v. Sampson**, 48 Colo. 285, 110 P. 79 (1910) (imposing strict liability under 1899 statute for destruction of cattle caused by impounding water in a reservoir; statute since repealed and reenacted as section 37-87-104(1), C.R.S., eliminating strict liability). *But see* **Liber v. Flor**, 160 Colo. 7, 415 P.2d 332 (1966) (refusing to apply rule of absolute liability for storage of dynamite).

2. Such uniquely inherently dangerous activities are often referred to as ultrahazardous or abnormally dangerous activities. **Bennett v. Greeley Gas Co.**, 969 P.2d 754 (Colo. App. 1998) (distinguishing ultrahazardous from inherently dangerous activities).

3. The question whether an activity is ultrahazardous is question of law for the court. RESTATEMENT (SECOND) OF TORTS § 520 cmt. 1 (1977). Factors to be considered in whether an activity is ultrahazardous include whether: (1) the activity poses a high degree of risk of harm to a person, land, or chattels; (2) it is likely that the resulting harm will be great; (3) the risk cannot be eliminated by exercising reasonable care; (4) the activity is not a matter of common usage; (5) the activity is inappropriate where it occurred; and (6) the activity's value to the community is outweighed by the danger. **Minto v. Sprague**, 124 P.3d 881 (Colo. App. 2005).

4. In addition to giving rise to strict liability, employers are vicariously liable for damages caused by ultrahazardous activities performed on their behalf by their independent contractors. *See* **Garden of the Gods Village**, 133 Colo. at 294–95, 294 P.2d at 601–02.

### Source and Authority

This instruction is supported by **Garden of the Gods Village**, 133 Colo. at 291–93, 294 P.2d at 600–01; and **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978). The ultrahazardous activity doctrine traces its origins to the seminal English chancery court case of **Rylands v. Fletcher**, L.R. 3 H.L. 330 (1868).

**9:8 REASONABLE CARE—DEFINED**

**Reasonable care is that degree of care which a reasonably careful person would use under the same or similar circumstances.**

**Notes on Use**

This instruction should be used when “reasonable care” is used in another instruction and needs further definition.

**Source and Authority**

This instruction is supported by **Blankette v. Public Service Co.**, 90 Colo. 456, 10 P.2d 327 (1932) (dictum). See **Bedee v. Am. Med. Response**, 2015 COA 128, ¶ 24, 361 P.3d 1083; **Winkler v. Shaffer**, 2015 COA 63, ¶ 16, 356 P.3d 1020; see also **Richardson v. El Paso Consol. Gold Mining Co.**, 51 Colo. 440, 118 P. 982 (1911); RESTATEMENT (SECOND) OF TORTS § 283 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984).



**9:9 CHILDREN—STANDARD OF CARE—  
NEGLIGENCE (INCLUDING  
COMPARATIVE NEGLIGENCE CASES)**

**(A child under the age of seven at the time of an occurrence is incapable of negligence.)**

**A child (seven years of age or older at the time of an occurrence) is under a duty to use that degree of care which children of similar age, experience and intelligence would ordinarily use under the same or similar circumstances to protect (themselves) (others) from (bodily injury) (death) (property damage).**

**Notes on Use**

1. When there is no dispute that the child was under seven years, only the first parenthesized paragraph should be used. When there is no dispute that the child was over the age of seven, only the second paragraph should be used, deleting the first parenthetical phrase referring to age. Where there is a dispute as to whether the child was under or over the age of seven, both paragraphs should be used. The other parenthetical words should be used as are appropriate to the issues in dispute and the evidence in the case. The alternative “others” or “themselves” is to be used depending on whether the minor party is alleged to have been negligent or contributorily negligent. If the minor party is alleged to have been both, then the instruction should read “themselves and others.”

2. While a child under the age of seven is incapable, as a matter of law, of being contributorily negligent, *see Benallo v. Bare*, 162 Colo. 22, 427 P.2d 323 (1967), and *Fletcher v. Porter*, 754 P.2d 788 (Colo. App. 1988), a child seven years of age or more is capable of being negligent under this instruction. *LeCoq v. Klemme*, 28 Colo. App. 590, 476 P.2d 280 (1970). Also, although a child may be negligent or contributorily negligent under the common-law standard of care stated in this instruction, a child under the age of ten, because he cannot be found guilty of criminal conduct under the provisions of section 18-1-801, C.R.S., may not be found negligent or contributorily negligent under the doctrine of negligence per se (Instruction 9:14). *Calkins v. Albi*, 163 Colo. 370, 431 P.2d 17 (1967).

3. The usual standard of care required of children as set out in this instruction does not apply to a minor operating a motor vehicle. *See* Instruction 11:5 (duty of care of minor operating motor vehicle).

**Source and Authority**

This instruction is supported by *Roberts v. Fisher*, 169 Colo. 288,

455 P.2d 871 (1969) (age); **Krause v. Watson Brothers Transportation Co.**, 119 Colo. 73, 200 P.2d 387 (1948) (age); **Lakeside Park Co. v. Wein**, 111 Colo. 322, 141 P.2d 171 (1943) (age and intelligence); **Simkins v. Dowis**, 100 Colo. 355, 67 P.2d 627 (1937) (age and intelligence); **Colorado Utilities Corp. v. Casady**, 89 Colo. 156, 300 P. 601 (1931) (age); RESTATEMENT (SECOND) OF TORTS §§ 283A, 464 (1965); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 179-82 (5th ed. 1984).

**9:10 VOLUNTEER—DUTY OF CARE**

**One who voluntarily assumes the care of an (injured) (ill) person is under a duty to act as a reasonably careful person would under the same or similar circumstances.**

**Notes on Use**

1. Use whichever parenthesized word is more appropriate.
2. In appropriate cases this instruction may be modified to state the general rule concerning the duty of a volunteer who assumes a duty of affirmative action. *See Leppke v. Segura*, 632 P.2d 1057 (Colo. App. 1981) (one who does an affirmative act has a duty to use due care to avoid creating, as a result of such act, an unreasonable risk of foreseeable damage or injury to foreseeable persons (applying RESTATEMENT (SECOND) OF TORTS § 302 cmt. a (1965) (citing § 320))).
3. This instruction either should not be given, or, if given, should be appropriately modified in cases in which a statutory immunity from liability for ordinary negligence may be applicable. *See, e.g.*, § 13-21-116(2), C.R.S. (acts or omissions of gratuitous volunteers); § 13-21-108, C.R.S. ("Good Samaritan" statute); § 13-21-114, C.R.S. (immunity of persons and organizations engaged in mine rescue or recovery work).

**Source and Authority**

This instruction is supported by RESTATEMENT (SECOND) OF TORTS §§ 324, 324A (1965). *See also St. Luke's Hospital v. Indus. Comm'n*, 142 Colo. 28, 349 P.2d 995 (1960) (dictum).



## 9:11 SUDDEN EMERGENCY

### Instruction Deleted

#### Note

In **Bedor v. Johnson**, 2013 CO 4, ¶ 2, 292 P.3d 924, the Colorado Supreme Court held that trial courts should no longer give the sudden emergency instruction in negligence cases because the instruction's potential to mislead the jury greatly outweighs its minimal utility.

## 9:12 HAPPENING OF ACCIDENT NOT PRESUMPTIVE NEGLIGENCE

**The occurrence of an accident does not raise any presumption of negligence on the part of either the plaintiff or the defendant.**

### Notes on Use

1. This instruction should not be given in cases where the happening of an accident does give rise to a presumption of negligence, e.g., rear-end collision cases (Instruction 11:12) and *res ipsa loquitur* cases (Instruction 9:17). **Gambrell v. Ravin**, 764 P.2d 362 (Colo. App. 1988), *aff'd*, 788 P.2d 817 (Colo. 1990); **Kitto v. Gilbert**, 39 Colo. App. 374, 570 P.2d 544 (1977). *See also* **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985) (instruction should not be given where it would conflict with a contrary presumption created by statute).

### Source and Authority

1. This instruction is supported by **Kendrick v. Pippin**, 252 P.3d 1052 (Colo. 2011); **Pence v. Chaudet**, 163 Colo. 104, 428 P.2d 705 (1967); **City of Aurora v. Weeks**, 152 Colo. 509, 384 P.2d 90 (1963); **National Construction Co. v. Holt**, 137 Colo. 208, 322 P.2d 1046 (1958); and **Perry Lumber Co. v. Ruybal**, 133 Colo. 502, 297 P.2d 531 (1956). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 242 (5th ed. 1984).

2. “While it is true, that ‘proof of the happening of an accident, or the incurrance of an injury alone raises no inference of negligence,’ it is equally true that negligence may be established by the facts and circumstances surrounding an accident.” **Remley v. Newton**, 147 Colo. 401, 405, 364 P.2d 581, 583 (1961); *accord* **Alhilo v. Kliem**, 2016 COA 142, ¶ 42, 412 P.3d 902.

## 9:13 LOOKING BUT FAILING TO SEE AS NEGLIGENCE

To look in such a manner as to fail to see what must have been plainly visible is to look without a reasonable degree of care and is of no more effect than not to have looked at all.

### Notes on Use

1. This instruction may be given in cases of contributory negligence as well as negligence.

2. The giving of Instruction 11:1 (duty to maintain lookout) is not necessarily precluded by the giving of this instruction. **Horton v. Mondragon**, 705 P.2d 977 (Colo. App. 1984).

3. This instruction should not be given unless "the alleged negligence involved the failure to see something which was plainly visible, and the allegedly negligent actor [claims or admits] he did not see it." **Zavorka v. Union Pac. R.R.**, 690 P.2d 1285, 1289 (Colo. App. 1984); *accord* **Regents of the Univ. of Colo. v. Harbert Constr. Co.**, 51 P.3d 1037 (Colo. App. 2001). This instruction must be appropriately modified if there is conflicting evidence as to whether the thing to be observed was plainly visible. **Brady v. Burlington N. R.R.**, 752 P.2d 592 (Colo. App. 1988); *see also* **Pizza v. Wolf Creek Ski Dev. Corp.**, 711 P.2d 671 (Colo. 1985) (error to give this instruction where the thing to be avoided was not obvious); **Martinez v. W.R. Grace Co.**, 782 P.2d 827 (Colo. App. 1989) (error to give this instruction when there is a dispute as to whether the hazard was "plainly" visible).

### Source and Authority

This instruction is supported by **Clark v. Bunnell**, 172 Colo. 32, 470 P.2d 42 (1970); **Folck v. Haser**, 164 Colo. 11, 432 P.2d 245 (1967); **Behr v. McCoy**, 138 Colo. 137, 330 P.2d 535 (1958) (citing several earlier cases); **Union Pacific Railroad v. Cogburn**, 136 Colo. 184, 315 P.2d 209 (1957) (involving contributory negligence); and **Fabling v. Jones**, 108 Colo. 144, 114 P.2d 1100 (1941). *See also* RESTATEMENT (SECOND) OF TORTS § 289 (1965).



## 9:14 NEGLIGENCE PER SE—VIOLATION OF STATUTE OR ORDINANCE

At the time of the occurrence in question in this case, the following (statute[s]) (ordinance[s]) of the [name of municipal corporation], State of Colorado (was) (were) in effect:

*(Insert quotation of applicable statute[s] or ordinance[s]).*

A violation of (this) (these) (statute[s]) (ordinance[s]) constitutes negligence.

If you find such a violation, you may only consider it if you also find that it was a cause of the claimed (injuries) (damages) (losses).

### Notes on Use

1. Use whichever parenthesized words are appropriate. See **Easton v. 1738 P'ship**, 854 P.2d 1362 (Colo. App. 1993).

2. One or more appropriate instructions on cause should also be given with this instruction. See Part D of this chapter.

3. This instruction should not be given unless (1) one of the purposes of the statute or ordinance was to protect against the type of injuries or losses the plaintiff sustained, and (2) the plaintiff was a member of the group of persons the statute or ordinance was intended to protect. See **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002); **Davenport v. Cmty. Corr. of the Pikes Peak Region, Inc.**, 962 P.2d 963 (Colo. 1998); **Lyons v. Nasby**, 770 P.2d 1250, 1257 (Colo. 1989); **Dickinson v. Lincoln Bldg. Corp.**, 2015 COA 170M, ¶ 54, 378 P.3d 797 (building code section applicable to design and construction of exit doors was not enacted to protect against injuries potentially incurred when attempting to open a locked exit door); **Lawson v. Stow**, 2014 COA 26, ¶¶ 43, 47, 327 P.3d 340 (the false reporting statute, § 18-8-111(1)(b), C.R.S., cannot serve as the basis for negligence per se claim); **Smit v. Anderson**, 72 P.3d 369 (Colo. App. 2002) (building code not designed to protect person injured while assisting owner in building house); **Trinity Universal Ins. Co. v. Streza**, 8 P.3d 613 (Colo. App. 2000) (fuel products statute not applicable to incidental use of propane heater by contractor); **Liebelt v. Bob Penkhuis Volvo-Mazda, Inc.**, 961 P.2d 1147 (Colo. App. 1998) (automobile dealer was not negligent per se by violating "dealer plate law"); **Jacque v. Pub. Serv. Co.**, 890 P.2d 138 (Colo. App. 1994); **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993); **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989),

*rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991); **Comfort v. Rocky Mtn. Consultants, Inc.**, 773 P.2d 615 (Colo. App. 1989); **Russo v. Birrenkott**, 770 P.2d 1335 (Colo. App. 1988); *see also* **Leake v. Cain**, 720 P.2d 152 (Colo. 1986); **Dunbar v. Olivieri**, 97 Colo. 381, 50 P.2d 64 (1935), *overruled on other grounds by* **Mile High Fence Co. v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971); **Crespin v. Largo Corp.**, 698 P.2d 826 (Colo. App. 1984), *aff'd*, 727 P.2d 1098 (Colo. 1986); **Bartley v. Floyd**, 695 P.2d 781 (Colo. App. 1984), *aff'd*, 727 P.2d 1109 (Colo. 1986) (plaintiff within class of persons intended to be protected); **Aetna Cas. & Surety Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984); **Phillips v. Monarch Recreation Corp.**, 668 P.2d 982 (Colo. App. 1983); **Iverson v. Solsbery**, 641 P.2d 314 (Colo. App. 1982); **Hamilton v. Gravinsky**, 28 Colo. App. 408, 474 P.2d 185 (1970), *aff'd*, 174 Colo. 206, 483 P.2d 385 (1971); RESTATEMENT (SECOND) OF TORTS § 286 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 222-27 (5th ed. 1984).

4. This instruction does not apply when the ordinance or statute is construed as only imposing an obligation for the benefit of the public at large, rather than for individuals, as members of the public. **Bittle v. Brunetti**, 712 P.2d 1112, 1113 (Colo. App. 1985) (ordinance requiring abutting landowner to remove snow from a public walk "is penal only and cannot serve as a basis of civil liability for one injured on the walk"), *aff'd*, 750 P.2d 49 (Colo. 1988) (unless legislative body expressly makes property owners civilly liable for a violation, intended purpose will be understood to benefit primarily the municipality); *accord* **Foster v. Redd**, 128 P.3d 316 (Colo. App. 2005); *see also* **Dunlap v. Colo. Springs Cablevision, Inc.**, 799 P.2d 416 (Colo. App. 1990) (if the exclusive purpose of a legislative enactment is to secure rights or privileges to the public at large, not citizens in their individual capacity, no basis exists for a claim of negligence per se), *rev'd on other grounds*, 829 P.2d 1286 (Colo. 1992). *See also* **Smith v. Surgery Ctr. at Lone Tree, LLC**, 2020 COA 145M, ¶¶ 38-51, 484 P.3d 745 (federal and state regulations governing licensure and Medicare participation criteria for ambulatory surgical centers did not provide a basis for a negligence per se claim despite general references to a "safe environment" operating in a "safe manner").

5. Nor should this instruction be given unless there is sufficient evidence that the conduct was in violation of the relevant statute or ordinance as construed by the court, and that such violation was a proximate cause of the damages being claimed. **Orth v. Bauer**, 163 Colo. 136, 429 P.2d 279 (1967); **Parrish v. Smith**, 102 Colo. 250, 78 P.2d 629 (1938); *see* **Beasley v. Best Car Buys, LTD**, 2015 COA 145, ¶ 32, 363 P.3d 777; **Harless v. Geyer**, 849 P.2d 904 (Colo. App. 1992); **Kepley v. Kim**, 843 P.2d 133 (Colo. App. 1992); **Comfort v. Rocky Mtn. Consultants, Inc.**, 773 P.2d 615 (Colo. App. 1989) (proof of violation required); **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988), *overruled on other grounds by* **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992); **Sanchez v. Staats**, 34 Colo. App. 243, 526 P.2d



672 (1974), *aff'd*, 189 Colo. 228, 539 P.2d 1233 (1975); *see also* **Lego v. Schmidt**, 805 P.2d 1119 (Colo. App. 1990) (no evidence that defendants, who were passengers in vehicle which struck pedestrian, violated ordinance or statute or that “their use of vehicle was a proximate cause of pedestrian’s injuries”).

6. If necessary, the court should give additional instructions defining the terms used in the statute or ordinance.

7. Because a child under the age of ten cannot be found guilty of criminal conduct under the provisions of section 18-1-801, C.R.S., this instruction is not applicable to such children. **Calkins v. Albi**, 163 Colo. 370, 431 P.2d 17 (1967).

### Source and Authority

1. This instruction is supported by **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986); **Palmer v. A.H. Robins Co., Inc.**, 684 P.2d 187 (Colo. 1984) (statute); **Kirk v. Himes**, 170 Colo. 378, 461 P.2d 444 (1969) (statute); **Reed v. Barlow**, 153 Colo. 451, 386 P.2d 979 (1963) (ordinance violation involving contributory negligence of plaintiff); **Lambotte v. Payton**, 147 Colo. 207, 363 P.2d 167 (1961); **La Garde v. Aeberman**, 144 Colo. 465, 356 P.2d 971 (1960); **Ankeny v. Talbot**, 126 Colo. 313, 250 P.2d 1019 (1952); **Barsch v. Hammond**, 110 Colo. 441, 135 P.2d 519 (1943) (statute); and **Hertz Driv-Ur-Self Sys., Inc. v. Hendrickson**, 109 Colo. 1, 121 P.2d 483 (1942) (statute). *See also* **City & County of Denver v. DeLong**, 190 Colo. 219, 545 P.2d 154 (1976); **Nutting v. N. Energy, Inc.**, 874 P.2d 482 (Colo. App. 1994); **Schneider v. Midtown Motor Co.**, 854 P.2d 1322 (Colo. App. 1992) (trial court erred in granting summary judgment for automobile dealer where material issues of fact remained on issue of whether violation of statute prohibiting automobile owner from allowing unlicensed driver to drive constituted negligence per se).

2. The doctrine of negligence per se does not apply unless the statute or ordinance prescribes or proscribes specific conduct. **Sego v. Mains**, 41 Colo. App. 1, 578 P.2d 1069 (1978). It does not apply, for example, to a statutorily authorized discretionary act. **Bauer v. Sw. Denver Mental Health Ctr., Inc.**, 701 P.2d 114 (Colo. App. 1985). Neither does the doctrine apply when the defendant was unaware he or she was engaged in the conduct that constituted the violation. **Singleton v. Collins**, 40 Colo. App. 340, 574 P.2d 882 (1978). In situations in which a statute or ordinance does not contain an absolute prohibition of the conduct in question, but instead uses language implying that a violation of the statute or ordinance must be based upon volitional conduct, it may be appropriate to modify this instruction to include additional language requiring the jury to consider whether the alleged violation was undertaken with the level of negligence, knowledge, or intent required by the statute or ordinance. **Novak v. Craven**, 195 P.3d 1115 (Colo. App. 2008).

3. If a statutory standard of care is a codification of common-law



negligence, the negligence per se instruction has no practical effect when given alongside a common-law negligence instruction. In such cases, the court need not give both a common-law negligence instruction and a negligence per se instruction. **Winkler v. Shaffer**, 2015 COA 63, ¶ 18, 356 P.3d 1020; **Silva v. Wilcox**, 223 P.3d 127 (Colo. App. 2009); see **Fishman v. Kotts**, 179 P.3d 232 (Colo. App. 2007); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 cmt. e (2005).

4. In cases subject to the Colorado Premises Liability Act, § 13-21-115, C.R.S., a plaintiff may not assert a claim of negligence per se against a landowner to recover for damages caused on the premises. The premises liability statute establishes a comprehensive and exclusive legislative scheme for premises liability claims. However, certain statutes or ordinances may be relevant to establish the standard of reasonable care, and violation of that statute or ordinance may be evidence of a failure to exercise reasonable care for purposes of establishing a premises liability claim. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008).

5. In addition to state statutes and municipal ordinances, this instruction, appropriately modified, also may be applicable to violations of applicable federal regulations. Compare **Hageman v. TSI, Inc.**, 786 P.2d 452 (Colo. App. 1989), with **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002) (violation of regulatory standards issued pursuant to the Occupational Safety and Health Act, 29 U.S.C. §§ 651 to -678, does not constitute negligence per se but admission of regulations are some, albeit non-conclusive, evidence of the standard of care in the relevant industry), and **Canape v. Petersen**, 897 P.2d 762 (Colo. 1995) (same).

6. For a discussion of the possible impact of the Colorado Governmental Immunity Act on the application of the negligence per se doctrine, see **State v. Moldovan**, 842 P.2d 220 (Colo. 1992).

7. Generally, to determine if a private tort remedy is available to a person alleging that a defendant has violated a statutory duty, a court must consider three factors: (1) whether the plaintiff is within the class of persons intended to be benefitted by the legislative enactment; (2) whether the General Assembly intended to create, albeit implicitly, a private right of action; and (3) whether an implied civil remedy would be consistent with the legislative scheme. **Allstate Ins. Co. v. Parfrey**, 830 P.2d 905 (Colo. 1992); **Grizzell v. Hartman Enters., Inc.**, 68 P.3d 551 (Colo. App. 2003) (no private tort remedy available to parent of child injured as a result of a violation of the Youth Employment Opportunity Act, § 8-12-101 to -117, C.R.S.); see also **Gerrity Oil & Gas Corp. v. Magness**, 946 P.2d 913 (Colo. 1997) (when statutory language indicates that legislature considered but chose not to include private remedy for damages, such remedy will not be inferred).

8. A violation of either the Colorado Passenger Tramway Act, §§ 25-5-701 to -720, C.R.S., or the Colorado Ski Safety and Liability Act,

§§ 33-44-101 to -114, C.R.S., constitutes negligence per se. **Bayer v. Crested Butte Mtn. Resort, Inc.**, 960 P.2d 70 (Colo. 1998).

9. For a discussion regarding the difference between strict liability in tort and negligence per se, see **Lui v. Barnhart**, 987 P.2d 942 (Colo. App. 1999) (in action by motorist who collided with horse, mere fact that horse was out of corral did not establish, as a matter of law, that owner had violated ordinance requiring that such animals be confined, or that owner was negligent per se).

10. The Colorado Governmental Immunity Act applies to a claim for vicarious liability against a governmental entity based on negligence per se when vicarious liability is based on the conduct of the entity's employee done within the course of employment. **L.J. v. Carricato**, 2018 COA 3, ¶ 37, 413 P.3d 1280.

## 9:15 CONDUCT IN COMPLIANCE WITH STATUTE OR ORDINANCE AND JUSTIFIABLE VIOLATION OF STATUTE

Even if (statutes) (ordinances) govern the actions of persons, such persons must use reasonable care under the particular circumstances and conditions prevailing.

A person violating a (statute) (ordinance) may justifiably do so if compliance with the (statute) (ordinance) would have created a greater risk of danger or injury to him or herself or others.

### Notes on Use

1. Use whichever parenthesized words are appropriate.

2. The first paragraph may be used alone as a separate instruction in appropriate cases where it is claimed that because of a party's compliance with a statute, that party was not negligent.

3. The second paragraph of this instruction should be given after Instruction 9:14, but only if there is sufficient evidence on which justification might be found under the rule stated in this instruction. For the statutory justifications applicable in criminal cases, some or all of which may be applicable in civil cases under the second paragraph of this instruction, see sections 18-1-701 to -709, C.R.S. In such cases, the second paragraph should be appropriately modified. A violation because of lack of knowledge as to the existence of the statute or ordinance is not justifiable. *See* Instruction 9:16; *see also* **People v. Brandyberry**, 812 P.2d 674 (Colo. App. 1990) (to be entitled to choice of evils defense as defined by section 18-1-702, C.R.S., actor's criminal conduct must be necessary because of sudden and unforeseen emergence of situation requiring actor's immediate action to prevent occurrence of imminently impending injury).

### Source and Authority

1. The rule stated in the first paragraph is supported by **Oliver v. Weaver**, 72 Colo. 540, 212 P. 978 (1923) (compliance not conclusive evidence of no negligence). *See also* RESTATEMENT (SECOND) OF TORTS § 288C (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 233 (5th ed. 1984).

2. The rule stated in the second paragraph is supported by **Crosby v. Canino**, 84 Colo. 225, 268 P. 1021 (1928). *See also* **La Garde v. Aeberman**, 144 Colo. 465, 356 P.2d 971 (1960); **Larson v. Long**, 74



Colo. 152, 219 P. 1066 (1923); RESTATEMENT (SECOND) OF TORTS § 288A; PROSSER AND KEETON ON THE LAW OF TORTS, *supra*, § 36, at 227-29.

INSTRUCTIONS TO THE JURY

It is your duty to determine whether the defendant is liable for the plaintiff's injuries. You must find for the plaintiff if you believe that the defendant's negligence was the proximate cause of the plaintiff's injuries.

A person is negligent if he fails to exercise the care that a reasonable person would exercise under the same or similar circumstances. Negligence is a failure to exercise the care that a reasonable person would exercise under the same or similar circumstances.

INSTRUCTIONS TO THE JURY

1. Use whatever common sense and common knowledge you possess in determining the facts of the case.

You are to determine the facts of the case from the evidence presented to you. You are not to speculate or guess. You are to determine the facts of the case from the evidence presented to you.

The burden of proof is on the plaintiff. He must prove that the defendant was negligent and that the negligence was the proximate cause of the plaintiff's injuries. If you find that the defendant was negligent and that the negligence was the proximate cause of the plaintiff's injuries, you must find for the plaintiff. If you find that the defendant was not negligent or that the negligence was not the proximate cause of the plaintiff's injuries, you must find for the defendant.

INSTRUCTIONS TO THE JURY

It is your duty to determine whether the defendant is liable for the plaintiff's injuries. You must find for the plaintiff if you believe that the defendant's negligence was the proximate cause of the plaintiff's injuries.

The burden of proof is on the plaintiff. He must prove that the defendant was negligent and that the negligence was the proximate cause of the plaintiff's injuries. If you find that the defendant was negligent and that the negligence was the proximate cause of the plaintiff's injuries, you must find for the plaintiff.

## 9:16 UNKNOWNING VIOLATION OF STATUTE OR ORDINANCE

**It is not a defense to a claimed act of negligence that a person was unaware that his or her conduct constituted a violation of a (statute) (ordinance).**

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction does not apply and should not be given in a case where the person allegedly violating the statute was unaware and reasonably could not be aware of the fact that he or she was engaging in the conduct which constituted the violation, for example, a person whose tail lights on the car the person was driving suddenly went out while the person was driving on a highway at night. *See also Singleton v. Collins*, 40 Colo. App. 340, 574 P.2d 882 (1978) (landlady not held liable under the doctrine of negligence per se when unaware condition on the premises, created by builder, was in violation of ordinance, and governmental inspection had indicated building was in compliance).
3. This instruction is intended only to cover the situation where the person was aware he or she was engaging in the conduct, but was unaware of a statute or ordinance making such conduct unlawful.
4. In appropriate cases, this instruction should be given with Instruction 9:14 (violation of statute or ordinance).
5. For exceptions to the rule stated in this instruction, see section 18-1-504(2), C.R.S.

### Source and Authority

This instruction is supported by section 18-1-504(2), and RESTATEMENT (SECOND) OF TORTS § 290 cmt. o (1965).

**9:17 RES IPSA LOQUITUR—PERMISSIBLE  
INFERENCE ARISING FROM  
REBUTTABLE PRESUMPTION OF  
NEGLIGENCE**

In deciding whether or not the defendant, *(name)*, was negligent, you may, but are not required to, draw an inference that the defendant was negligent if you find that:

1. The plaintiff, *(name)*, had **(injuries) (damages) (losses)** caused by the *(insert appropriate description of instrumentality)*; and

2. Such **(injuries) (damages) (losses)** would not have occurred unless someone was negligent in *(insert one or more appropriate descriptions, e.g., “using,” “handling,” “operating,” “manufacturing,” “repairing,” “maintaining,” etc.)* the *(insert appropriate description of instrumentality)*; and

3. At the time and in the way such negligence probably occurred, it was more likely that the negligence of the defendant (or someone for whom the defendant was legally responsible), rather than the negligence of anyone else, caused the plaintiff's **(injuries) (damages) (losses)**.

If you draw this inference, you may consider it along with all the other evidence in the case in deciding whether or not the defendant was negligent.

**Notes on Use**

1. To demonstrate the applicability of *res ipsa loquitur*, a plaintiff must introduce evidence that, when viewed in the light most favorable to the plaintiff, establishes each of three elements by a preponderance of the evidence: (1) the event is of the kind that ordinarily does not occur in the absence of negligence; (2) responsible causes other than the defendant's negligence are sufficiently eliminated; and (3) the presumed negligence is within the scope of the defendant's duty to the plaintiff. **Chapman v. Harner**, 2014 CO 78, ¶ 5, 339 P.3d 519; **Kendrick v. Pippin**, 252 P.3d 1052 (Colo. 2011).



2. Formerly, when the trial court determined that *res ipsa loquitur* applied, the jury was instructed to consider the presumption of negligence together with all other evidence in the case in deciding whether or not the defendant was negligent. In **Chapman**, 2014 CO 78, ¶¶ 25-26, however, the Supreme Court held that, under Rule 301, the *res ipsa loquitur* doctrine shifts only the burden of going forward with evidence to rebut the presumed fact of negligence. The doctrine does not shift the burden of proof, which remains on the plaintiff throughout the case.

3. If the plaintiff presents sufficient evidence for a jury to find in favor of the plaintiff on the elements of *res ipsa loquitur*, then the burden shifts to the defendant to produce legally sufficient evidence rebutting the presumption. **Chapman**, 2014 CO 78, ¶ 25. If the defendant fails to produce legally sufficient evidence rebutting the presumption, **Chapman** does not state the procedure to be followed. **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009), addressing the rebuttable presumption of undue influence in will contests, sets forth in detail the general procedure for applying a rebuttable presumption. Although **Krueger** was distinguished in **Chapman**, 2014 CO 78, ¶ 15, on the effect of applying *res ipsa loquitur*, **Krueger** nonetheless may provide guidance about the procedure when the defendant fails to rebut the presumption of negligence created by *res ipsa loquitur*. **Krueger** states that “if the opponent does not meet her burden [of going forward], the presumption establishes the presumed facts as a matter of law.” 205 P.3d at 1156. In that event, see Instruction 2:6 (instructing jury on remaining issues where trial court has directed a verdict on negligence against the defendant).

4. If the defendant meets the burden of going forward by producing sufficient evidence to rebut the presumption of negligence, then “the presumption is destroyed and only a permissible inference of negligence remains. The jury may consider this inference alongside the other evidence in determining whether the plaintiff satisfied his burden to prove that the defendant was negligent, but it is not required to do so, and the trial court has discretion to determine whether or not to instruct the jury on the remaining permissible inference.” **Chapman**, 2014 CO 78, ¶ 25. If the court decides to instruct on the remaining permissible inference, this instruction, rather than Instruction 3:5 (permissible inference arising from rebuttable presumption), should be used. However, the supreme court “disfavor[s] instructions emphasizing specific evidence.” **Krueger**, 205 P.3d at 1157. “A trial court does not abuse its discretion in failing to instruct the jury on a permissible inference unless the omission caused substantial prejudice to the requesting party.” *Id.* When the permissible inference arises, an instruction should be given if “justified by strong underlying policy considerations.” *Id.*

5. As an example of policy considerations that would support giving a permissible inference instruction, the court in **Krueger** cited the

presumption that evidence destroyed by a civil litigant would have been unfavorable to the destroying party. *Id.* “A trial court may give this permissible inference instruction as long as it furthers two underlying rationales.” *Id.* “The instruction should be both punitive and remedial; it should deter the parties from destroying evidence, and restore the prejudiced party to the position she would have been in had the evidence not been destroyed.” *Id.*

6. This instruction should not be given if the circumstances of the case “do not suggest or indicate superior knowledge or opportunity for explanation on the part of the party charged or if the plaintiff . . . has equal or superior means of information.” **Shutt v. Kaufman’s, Inc.**, 165 Colo. 175, 179-80, 438 P.2d 501, 503 (1968) (quoting **Yellow Cab Co. v. Hodgson**, 91 Colo. 365, 373, 14 P.2d 1081, 1084 (1932)).

7. If the doctrine of *res ipsa loquitur* applies, it is reversible error for the court to instruct the jury that the mere happening of an accident does not give rise to a presumption of negligence (Instruction 9:12). **Trione v. Mike Wallen Standard, Inc.**, 902 P.2d 454 (Colo. App. 1995); *see also* **Kitto v. Gilbert**, 39 Colo. App. 374, 570 P.2d 544 (1977).

8. The doctrine of *res ipsa loquitur* may apply in cases involving more than one defendant and in cases where the defendant may not have had “exclusive” control in a literal sense. **Branco E. Co. v. Leffler**, 173 Colo. 428, 482 P.2d 364 (1971); *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009); **Auxier v. Auxier**, 843 P.2d 93 (Colo. App. 1992), *overruled on other grounds by* **Scott v. Matlack, Inc.**, 39 P.3d 1160 (Colo. 2002). On the question of what constitutes sufficient proof on the issue of “exclusive” control, compare **Leffler**, 482 P.2d 364, with **Hilzer v. MacDonald**, 169 Colo. 230, 454 P.2d 928 (1969); *see also* **Holmes v. Gamble**, 655 P.2d 405 (Colo. 1982) (evidence insufficient to eliminate other possible responsible causes, including plaintiff’s own conduct and conduct of third persons); **Lui v. Barnhart**, 987 P.2d 942 (Colo. App. 1999) (in action by motorist who collided with horse, mere fact that horse was out of corral did not support instruction on *res ipsa loquitur* since horse’s presence on road could be explained by actions of unknown third parties); **Nutting v. N. Energy, Inc.**, 874 P.2d 482 (Colo. App. 1994); **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993); **Berrey v. White Wing Servs., Inc.**, 44 Colo. App. 506, 619 P.2d 82 (1980) (sufficient evidence of “exclusive” control). Also, in cases involving alleged medical malpractice, compare **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992), **Mudd v. Dorr**, 40 Colo. App. 74, 574 P.2d 97 (1977), and **Kitto**, 39 Colo. App. 374, 570 P.2d 544, with **Adams v. Leidholt**, 195 Colo. 450, 579 P.2d 618 (1978), *aff’d on other grounds*, 195 Colo. 450, 579 P.2d 618 (1978). *See also* **Holmes**, 655 P.2d at 409 (*res ipsa loquitur* instruction not warranted because it was “equally likely” that there was another cause for plaintiff’s injury); **Freedman v. Kaiser Found. Health Plan**, 849 P.2d 811 (Colo. App. 1992) (instruction on *res ipsa loquitur* not warranted where evidence did not sufficiently eliminate other possible causes of plaintiff’s damages and indicated that plaintiff’s



damages might have been caused by negligence of third party not named as a defendant); **Miller v. Van Newkirk**, 628 P.2d 143 (Colo. App. 1980) (insufficient evidence that "accident" would not ordinarily have happened in the absence of negligence).

9. In order to rely on the doctrine, it is not necessary for the plaintiff's proof to eliminate all possibilities other than the negligence of the defendant which might explain the accident and his injuries. **Adams**, 38 Colo. App. at 470, 563 P.2d at 20; *see also* **Montgomery Elevator Co. v. Gordon**, 619 P.2d 66 (Colo. 1980); **Manzi v. Montgomery Elevator Co.**, 865 P.2d 902 (Colo. App. 1993) (evidence sufficient to invoke doctrine against manufacturer of escalator where injuries occurred as a result of plaintiff's shoe being caught in escalator mechanism); **Hartford Fire Ins. Co. v. Pub. Serv. Co.**, 676 P.2d 25 (Colo. App. 1983). Moreover, once the plaintiff has established a prima facie case that the accident would not have happened but for the negligence of someone and that such negligence might have been that of the defendant, the presentation of conflicting evidence concerning other explanations as to how the accident might have been caused, or by whom, does not deprive the plaintiff of the right to have the case submitted to the jury on the theory of *res ipsa loquitur*. **Hartford Fire Ins. Co.**, 676 P.2d at 29.

10. In cases governed by the comparative negligence statute, it is not necessary in all cases for the plaintiff to prove a lack of contributory negligence on his or her part in order to rely on the doctrine of *res ipsa loquitur* as a means of establishing the defendant's negligence. That would appear to be necessary only where the plaintiff has had some "control" over the instrumentality at the time of the probable negligence and consequently might have been the only person whose negligence caused his or her injuries. Such is not the case, however, where the doctrine would be sufficient alone to establish negligence on the part of anyone having "exclusive control of the instrumentality" at the time of the probable negligence, and any negligence of the plaintiff, even though it may have contributed to the plaintiff's injuries, for example, by enhancing them, was causally independent of whatever events may have caused the instrumentality to bring about the accident. **Gordon**, 619 P.2d at 70; *see also* **Tracy v. Graf**, 37 Colo. App. 323, 550 P.2d 886 (1976), *rev'd on other grounds*, 194 Colo. 1, 568 P.2d 467 (1977).

11. The plaintiff need only disprove any possible contributory negligence on his or her part if the plaintiff had some control over the instrumentality at the time the instrumentality caused the accident, and the plaintiff's control was such that, if exercised negligently, it could have been the negligence inferable from the accident rather than that of the defendant. While other independent contributory negligence of the plaintiff may be established by the defendant to bar or reduce the plaintiff's damages under the comparative negligence statute, evidence of that negligence will not preclude the plaintiff's use of the doctrine of



res ipsa loquitur, if otherwise applicable, to establish negligence on the part of the defendant. **Gordon**, 619 P.2d at 70; see **Spoor**, 852 P.2d at 1295.

12. To rely on the doctrine, it is not necessary in all cases to establish that a specific instrumentality caused the injuries. It is sufficient if all reasonable causes were within the control of the defendant and the injuries would probably not have occurred in the absence of negligence. **Zimmer v. Celebrities, Inc.**, 44 Colo. App. 515, 615 P.2d 76 (1980).

13. “[A]llegations of specific negligence in a complaint do not preclude a plaintiff from relying on the doctrine.” **Hartford Fire Ins. Co.**, 676 P.2d at 27. In addition, “an attempt to prove [a specific act of] negligence does not negate the applicability of [the doctrine] so long as the evidence of [such] specific negligence does not conclusively establish the facts surrounding the accident.” *Id.*; see also **Zimmer**, 44 Colo. App. at 518, 615 P.2d at 79. However, in a medical malpractice claim the doctrine does not apply if the evidence establishes that a “specific act of negligence was the only likely cause for the harm.” **Kitto**, 39 Colo. App. at 380, 570 P.2d at 548; accord **Shelton v. Penrose-St. Francis Healthcare Sys.**, 968 P.2d 132 (Colo. App. 1998), *rev’d on other grounds*, 984 P.2d 623 (Colo. 1999).

14. Whether there is sufficient evidence for a reasonable jury to find the requirements of the doctrine have been established, and therefore whether this instruction should be given, is a question of law for the court. **Miller**, 628 P.2d at 146; **Zimmer**, 44 Colo. App. at 517, 615 P.2d at 78. In determining the sufficiency of the evidence, the court should not weigh the evidence nor apply a preponderance of the evidence test, but rather should apply the standard directed verdict test to each of the elements of the doctrine. **Holmes**, 655 P.2d at 409.

15. In a medical malpractice action, the doctrine of res ipsa loquitur does not apply if expert testimony is required to establish that the defendant caused the injury and that the injury would not have occurred in the absence of negligence. **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003).

### Source and Authority

This instruction is supported by **Chapman**, 2014 CO 78, ¶¶ 25-26; **Kendrick**, 252 P.3d at 1061; and **Ravin v. Gambrell**, 788 P.2d 817 (Colo. 1990). **Home Public Market v. Newrock**, 111 Colo. 428, 142 P.2d 272 (1943), supports the first part of the instruction as to the elements required for res ipsa loquitur. See **Bloxson v. San Luis Valley Crop Care, Inc.**, 198 Colo. 113, 596 P.2d 1189 (1979); **Leffler**, 173 Colo. at 435-36, 482 P.2d at 367-68; **Hamilton v. Smith**, 163 Colo. 88, 428 P.2d 706 (1967); **Zimmerman v. Franzen**, 121 Colo. 574, 220 P.2d 344 (1950); **Minto v. Sprague**, 124 P.3d 881 (Colo. App. 2005); **Canape**

**v. Peterson**, 878 P.2d 83 (Colo. App. 1994), *aff'd on other grounds*, 897 P.2d 762 (Colo. 1995); **U.S. Fid. & Guar. Co. v. Salida Gas Serv. Co.**, 793 P.2d 602 (Colo. App. 1989); **Mudd**, 40 Colo. App. at 77, 574 P.2d at 100; **Kitto**, 39 Colo. App. at 379-80, 570 P.2d 548; **Majors v. J.C. Penney Co., Inc.**, 31 Colo. App. 568, 506 P.2d 399 (1972) (error to instruct on *res ipsa loquitur* where accident was one that could have occurred in the absence of any negligence on the defendant's part and, further, could have been caused by plaintiff's voluntary act, negligence or otherwise); **Oil Bldg. Corp. v. Hermann**, 29 Colo. App. 564, 488 P.2d 1126 (1971); **Smith v. Curran**, 28 Colo. App. 358, 472 P.2d 769 (1970); *see also* **Krueger**, 205 P.3d 1154-56 (procedure for applying rebuttable presumption of undue influence in will contest).

## **B. CAUSATION**

### **Special Note**

The Committee has intentionally eliminated the use of the word “proximate” when instructing the jury on causation issues because the concept of proximate cause is adequately included in the instructions in this Part B and because the word “proximate” tends to be confusing to the jury.



## 9:18 CAUSE WHEN ONLY ONE CAUSE IS ALLEGED—DEFINED

The word “cause” as used in these instructions means an act or failure to act which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

### Notes on Use

1. Depending on the evidence in the particular case, when concurrent or succeeding causes are involved, additional instructions should be given with, or in lieu of, this instruction. See Instructions 9:19 and 9:20.

2. This instruction is not necessary and should not be given when Instruction 9:20 (intervening causes) is given. **Reaves v. Horton**, 33 Colo. App. 186, 518 P.2d 1380 (1973), *aff’d in part, rev’d in part on other grounds*, 186 Colo. 149, 526 P.2d 304 (1974).

3. This instruction applies a “but for” causation test, which cannot be satisfied based solely on evidence that the defendant’s conduct substantially increased the risk to the plaintiff. **Reigel v. SavaSenior-Care L.L.C.**, 292 P.3d 977 (Colo. App. 2011) (disapproving instruction that stated, “If you find that [defendant’s] negligence increased the risk of [plaintiffs] death or deprived [plaintiff] of some significant chance to avoid death, you may also find that [defendant’s] negligence was a cause of [plaintiffs] death,” and declining to follow **Sharp v. Kaiser Foundation Health Plan**, 710 P.2d 1153 (Colo. App. 1985), *aff’d*, 741 P.2d 714 (Colo. 1987)).

### Source and Authority

1. This instruction is supported by **Kaiser Foundation Health Plan v. Sharp**, 741 P.2d 714 (Colo. 1987); **Hook v. Lakeside Park Co.**, 142 Colo. 277, 351 P.2d 261 (1960); **Stout v. Denver Park & Amusement Co.**, 87 Colo. 294, 287 P. 650 (1930); **Colorado Springs & Interurban Railway v. Allen**, 55 Colo. 391, 135 P. 790 (1913); **Smith v. State Compensation Insurance Fund**, 749 P.2d 462 (Colo. App. 1987); and **Colorado Coal & Iron Co. v. Lamb**, 6 Colo. App. 255, 40 P. 251 (1895). See also **Reigel**, 292 P.3d at 988 (approving Instruction 9:18 language as a correct statement of Colorado law); RESTATEMENT (SECOND) OF TORTS §§ 431-33 (1965). See generally **LeHouillier v. Gallegos**, 2019 CO 8, ¶ 32, 434 P.3d 156 (citing RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965)) (“a necessary condition of legal causation is that the ‘harm would not have occurred had the actor not been negligent’ ”); **Lorenzen v. Pinnacol Assurance**, 2019 COA 54, ¶¶ 28–29, 457 P.3d 100 (citing RESTATEMENT (SECOND) OF TORTS § 432 (1965)) (the

but-for test is the standard applicable for determining causation under Colorado law).

2. As to the sufficiency of evidence on the issue of causation, see **Gibbons v. Ludlow**, 2013 CO 49, ¶ 2, 304 P.3d 239 (evidence insufficient to establish cause of economic damages beyond mere possibility or speculation); **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989) (evidence of proximate cause sufficient); **Kaiser Foundation Health Plan**, 741 P.2d at 719 (cause need not be proved with absolute certainty, nor need defendant's conduct be proved the only cause); **Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.**, 739 P.2d 239 (Colo. 1987) (proof of cause when insurance agent negligently fails to obtain requested insurance coverage); and **Reigel**, 292 P.3d at 988 (plaintiff must establish causation beyond mere possibility or speculation). For the general test for determining the sufficiency of evidence, see **Gossard v. Watson**, 122 Colo. 271, 221 P.2d 353 (1950).

## 9:19 CONCURRENT CAUSES (EXCLUDING DESIGNATED NONPARTY FAULT CASES)

More than one person may be responsible for causing (injuries) (damages) (losses). If you find that the defendant, (*name*), was negligent and that (his) (her) negligence caused (injury) (damage) (loss) to the plaintiff, it is not a defense that some third person's negligence might also have been a cause of the (injuries) (damages) (losses).

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction should be given when there might be a basis for contending that a third person, not a party to the action, was in whole or in part responsible for causing the plaintiff's losses.
3. It should not, however, be used in cases in which the negligence or fault of a designated nonparty has been properly put in issue under section 13-21-111.5(2) and (3)(b), C.R.S., as a cause, in whole or part, of the plaintiff's claimed damages. Instead, Instruction 9:20 (intervening causes) should be used.

### Source and Authority

This instruction is supported by **Colorado Mortgage & Investment Co. v. Giacomini**, 55 Colo. 540, 136 P. 1039 (1913); **Carlock v. Denver & Rio Grande Railroad**, 55 Colo. 146, 133 P. 1103 (1913); and **Colorado Mortgage & Investment Co. v. Rees**, 21 Colo. 435, 42 P. 42 (1895). See also RESTATEMENT (SECOND) OF TORTS § 439 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268 (5th ed. 1984). The supreme court quoted with approval an instruction based on this pattern instruction in **Rains v. Barber**, 2018 CO 61, ¶ 18, 420 P.3d 969.



**9:20 CAUSE—CONCURRENT CAUSES—  
INTERVENING CAUSES**

The word “cause” as used in these instructions means an act or failure to act that in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have happened.

If more than one act or failure to act contributed to the claimed injury, then each act or failure to act may have been a cause of the injury. A cause does not have to be the only cause or the last or nearest cause. It is enough if the act or failure to act joins in a natural and probable way with some other act or failure to act to cause some or all of the claimed injury.

(One’s conduct is not a cause of another’s injuries, however, if, in order to bring about such injuries, it was necessary that his or her conduct combine or join with an intervening cause that also contributed to cause the injuries. An intervening cause is a cause that would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances.)

**Notes on Use**

1. This instruction should be used when there is sufficient evidence that the defendant’s negligence was a proximate cause even though such negligence may not have been the most immediate cause and, to bring about the plaintiff’s losses, such negligence had to operate in conjunction with other causes.

2. When another concurrent actual cause may not have been sufficiently foreseeable so that it might constitute an intervening cause, thereby relieving the defendant of liability, the last parenthesized paragraph of this instruction setting forth the doctrine of intervening cause must be given. **Jones v. Caterpillar Tractor Co.**, 701 P.2d 84 (Colo. App. 1984); *see also* **Albo v. Shamrock Oil & Gas Corp.**, 160 Colo. 144, 415 P.2d 536 (1966); **Estate of Newton v. McNew**, 698 P.2d 835, 837 (Colo. App. 1984) (holding that “[a]n intervening cause relieves a defendant of liability for negligence only if the intervening cause is not reasonably foreseeable,” and concluding that the intentional

intervening acts of third persons were sufficiently foreseeable); RESTATEMENT (SECOND) OF TORTS §§ 440-53 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 44 (5th ed. 1984). The fact that a third person's concurrent act was intentionally tortious or criminal does not necessarily render that act an intervening cause. It is sufficient "if that act [was] reasonably and generally foreseeable." **Ekberg v. Greene**, 196 Colo. 494, 497, 588 P.2d 375, 377 (1978); *see also* **Taco Bell, Inc. v. Lannon**, 744 P.2d 43 (Colo. 1987); **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986); **Sewell v. Pub. Serv. Co.**, 832 P.2d 994 (Colo. App. 1991); Source and Authority to Instruction 9:27 (comparative negligence of the plaintiff with multiple defendants).

3. When a case is submitted to the jury on more than one theory of negligence and on the basis of the evidence the last parenthetical paragraph of this instruction would be appropriate as to one or more of the theories of negligence but not to all, the paragraph must be modified to make clear to the jury the theory or theories to which the rule stated in the paragraph may be applicable and the theory or theories to which it would not. **Kerby v. Flamingo Club, Inc.**, 35 Colo. App. 127, 532 P.2d 975 (1974).

4. In civil actions in which the negligence or fault of a designated nonparty has been properly put in issue under sections 13-21-111.5(2) and (3)(b), C.R.S., as a cause, in whole or in part, of the plaintiff's claimed damages, this instruction should be used rather than Instruction 9:19. In addition, in those cases, Instruction 9:24 (negligence or fault of designated nonparty) should also be given.

### Source and Authority

1. This instruction is supported by the authorities cited in Source and Authority to Instruction 9:19. Additional cases support the second paragraph of this instruction. *See* **Moore v. Standard Paint & Glass Co.**, 145 Colo. 151, 358 P.2d 33 (1960) (acts of others and act of God concurring with defendant's negligence); **Barlow v. N. Sterling Irrigation Dist.**, 85 Colo. 488, 277 P. 469 (1929) (concurring act of God); **Ryan Gulch Reservoir Co. v. Swartz**, 83 Colo. 225, 263 P. 728 (1928) (same); **Bradley v. Guess**, 797 P.2d 749 (Colo. App. 1989), *rev'd on other grounds sub nom.* **Seaward Constr. Co. v. Bradley**, 817 P.2d 971 (Colo. 1991).

2. "An intervening act of a human being . . . which is a normal response to the stimulus of a situation created by [the actor's] negligent conduct, is not a superseding cause of harm to another which the actor's conduct is a substantial factor in bringing about." **Calkins v. Albi**, 163 Colo. 370, 377, 431 P.2d 17, 20 (1967) (quoting RESTATEMENT (SECOND) OF TORTS § 443 (1965)); *see also* **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986) (the precise manner in which the injuries were caused need not have been foreseeable).

3. Cases supporting the third parenthesized paragraph include

**Farmers Mutual Insurance Co. v. Chief Industries, Inc.**, 170 P.3d 832 (Colo. App. 2007) (defendant who seeks to assert defense of intervening cause must request optional instruction language from the third parenthesized paragraph or the issue of intervening cause is deemed to be waived); and **Smith v. State Compensation Insurance Fund**, 749 P.2d 462 (Colo. App. 1987) (subsequent motorcycle accident an independent, intervening cause, not a foreseeable consequence of the defendant's claimed negligence). *But see* **Deines v. Atlas Energy Servs., LLC**, 2021 COA 24, ¶ 33, 484 P.3d 798 (foreseeability of subsequent motor vehicle accident is a factual question for the jury where the subsequent accident occurred 40 minutes and three-tenths of a mile away from original accident caused by the defendant's negligence).

4. In **Webb**, 718 P.2d at 1063-64, the court adopted the test that is set forth in the RESTATEMENT (SECOND) OF TORTS § 442B (1965), for determining the existence of an intervening cause. *Accord* **Groh v. Westin Operator, LLC**, 2013 COA 39, ¶ 49, 352 P.3d 472, *aff'd*, 2015 CO 25, 347 P.3d 606; **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Voight v. Colo. Mtn. Club**, 819 P.2d 1088 (Colo. App. 1991). Intervening cause principles apply in situations in which the defendant's negligence is alleged to have caused the plaintiff's decedent to commit suicide. In such cases, the test set forth in the RESTATEMENT (SECOND) OF TORTS § 455 (1965), is relevant in determining causation. **Moore v. W. Forge Corp.**, 192 P.3d 427 (Colo. App. 2007).

5. In a medical malpractice case, treatment by subsequent providers that constitutes ordinary negligence is not an intervening cause. **Danko v. Conyers**, 2018 COA 14, ¶ 63, 432 P.3d 958. But misconduct by a later provider that is extraordinary constitutes an intervening cause. *Id.* at ¶ 31 (citing RESTATEMENT (SECOND) OF TORTS § 457 cmt. d (1979)).

6. As to the sufficiency of evidence on the issue of cause, see **Kaiser Foundation Health Plan v. Sharp**, 741 P.2d 714 (Colo. 1987) (cause need not be proved with absolute certainty, nor need defendant's conduct be proved the only cause). *See also* **Gossard v. Watson**, 122 Colo. 271, 221 P.2d 353 (1950).



## 9:21 CAUSE—FORESEEABILITY LIMITATION

The negligence, if any, of the defendant, (*name*), is not a cause of any (injuries) (damages) (losses) to the plaintiff, (*name*), unless injury to a person in the plaintiff's situation was a reasonably foreseeable result of that negligence. The specific injury need not have been foreseeable. It is enough if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct.

### Notes on Use

1. This instruction is not applicable to unique or extensive unforeseeable injuries the plaintiff may have sustained because of some physical or mental peculiarity of the plaintiff, as long as some physical impact with the plaintiff was foreseeable. For example, a negligent driver who collides with another's car cannot avoid liability for all the other person's damages even though, because of personal peculiarities, the plaintiff's injuries or damages may be greatly in excess of what a reasonable person might expect a typical plaintiff to sustain. See *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 43, at 291-92 (5th ed. 1984); see also Instruction 6:7 ("thin skull" doctrine).

2. This instruction should be used "only when the evidence presents a jury question on whether the injured party was a person within the foreseeable zone of danger created by defendant's negligence and thus was owed a duty by defendant." **Chutich v. Samuelson**, 33 Colo. App. 195, 201, 518 P.2d 1363, 1367 (1973), *aff'd in part, rev'd in part on other grounds*, 187 Colo. 155, 529 P.2d 631 (1974); see also **Walcott v. Total Petroleum, Inc.**, 964 P.2d 609 (Colo. App. 1998) (risk that purchaser of gasoline would intentionally throw it on victim and set victim on fire was not reasonably foreseeable by operator of service station); **Scharrel v. Wal-Mart Stores, Inc.**, 949 P.2d 89 (Colo. App. 1997); **Cooley v. Paraho Dev. Corp.**, 851 P.2d 207 (Colo. App. 1992), *aff'd on other grounds sub nom. Gen. Elec. Co. v. Niemet*, 866 P.2d 1361 (Colo. 1994); **Sewell v. Pub. Serv. Co.**, 832 P.2d 994 (Colo. App. 1991).

### Source and Authority

1. This instruction is supported by **Aikens v. George W. Clayton Trust Commission**, 132 Colo. 374, 288 P.2d 349 (1955) (defendants could not reasonably foresee the accident); **Stout v. Denver Park & Amusement Co.**, 87 Colo. 294, 287 P. 650 (1930) (intervening cause could not reasonably have been anticipated); and **Town of Lyons v.**

**Watt**, 43 Colo. 238, 95 P. 949 (1908) (same). *See also* **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986) (the precise manner in which the injuries were caused need not have been foreseeable); **Smith v. State Comp. Ins. Fund**, 749 P.2d 462 (Colo. App. 1987) (subsequent motorcycle accident not foreseeable); **Wesley v. United Servs. Auto. Ass'n**, 694 P.2d 855 (Colo. App. 1984) (quoting this instruction with approval).

2. The fact that it may not have been foreseeable that an injury to the plaintiff as a particular individual person might result from the defendant's conduct does not necessarily absolve the defendant from liability. It is sufficient if the plaintiff was within a group of foreseeable persons who might have been endangered by the defendant's conduct. **Moore v. Standard Paint & Glass Co.**, 145 Colo. 151, 358 P.2d 33 (1960) (by implication); **Estate of Newton v. McNew**, 698 P.2d 835 (Colo. App. 1984); **Bartley v. Floyd**, 695 P.2d 781 (Colo. App. 1984), *aff'd on other grounds*, 727 P.2d 1109 (Colo. 1986).

3. Foreseeability in the context of determining proximate cause involves policy considerations as to whether a defendant's responsibility should extend to the results in question. **Keller v. Koca**, 111 P.3d 445 (Colo. 2005) (employer owed no duty to twelve-year-old sexually assaulted by employee on business premises on day that business was closed as risk was unforeseeable); *see also* **Build It & They Will Drink, Inc. v. Strauch**, 253 P.3d 302 (Colo. 2011) (under dram shop liability statute, injury need not be foreseeable by vendor who serves obviously intoxicated person, and vendor could be liable when the intoxicated patron stabbed another one-and-a-half blocks from nightclub); **Lyons v. Nasby**, 770 P.2d 1250 (Colo. 1989); **Largo Corp. v. Crespin**, 727 P.2d 1098 (Colo. 1986). *See generally* **Wagner v. Planned Parenthood Fed'n of Am., Inc.**, 2019 COA 26, ¶¶ 18–43, 471 P.3d 1089 (discussing foreseeability as an element of proximate cause in premises liability case arising out of mass shooting), *aff'd*, 2020 CO 51, 467 P.3d 287; **Deines v. Atlas Energy Servs., LLC**, 2021 COA 24, ¶ 33, 484 P.3d 798 (foreseeability of subsequent motor vehicle accident is a factual question for the jury where the subsequent accident occurred 40 minutes and three-tenths of a mile away from original accident caused by the defendant's negligence).

4. For cases discussing foreseeability in the context of determining whether a duty of care exists, see the Introductory Note to Chapter 9 and the Source and Authority to Instruction 9:1, under the subtopic "Existence and Scope of a Legal Duty." "A negligence claim requires two distinct and separate foreseeability analyses. First, foreseeability is an integral element of duty. Second, foreseeability is the touchstone of proximate cause. The former is a question of law for the court; the latter is a question of fact for the jury at trial." **P.W. v. Children's Hosp. Colo.**, 2016 CO 6, ¶ 24 n.7, 364 P.3d 891 (quoting **Westin Operator, LLC v. Groh**, 2015 CO 25, ¶ 33 n.5, 347 P.3d 606).



## C. COMPARATIVE NEGLIGENCE AND COMPARATIVE FAULT

### Special Note

1. The comparative negligence statute, section 13-21-111(2), C.R.S., could be construed to require that in all cases where the issue of plaintiff's comparative negligence is submitted to the jury for its determination, "the jury shall return a special verdict which shall state: (a) The amount of damages which would have been recoverable if there had been no contributory negligence; and (b) The degree of negligence of each party, expressed as a percentage." Under this interpretation, the statute would require that the jury determine the amount of plaintiff's damages in cases where the plaintiff is denied any recovery because the jury determines either (1) that the defendant was not negligent or (2) that the plaintiff's negligence is equal to or greater than that of the defendant. However, since subsection (2) of section 13-21-111 only applies to ". . . any action to which subsection (1) of this section applies . . ." and subsection (1) of the statute applies only to actions in which the plaintiff's "negligence was not as great as the negligence of the person against whom recovery is sought. . .," the statute can also be construed to require a determination of damages only in those cases where the negligence of the plaintiff is "not as great as the negligence" of the defendant. In drafting the special verdict forms set forth in this Part C, the Committee has not endorsed either of these interpretations of the statute.

2. In cases where the comparative negligence or fault of the plaintiff is in issue, Instruction 9:26, 9:27, or 9:28 should be used in conjunction with the accompanying special verdict forms. The special verdict forms set forth in 9:26A and B, 9:27A and B, and 9:28A and B require the jury to determine the amount of plaintiff's damages, regardless of whether the jury also determines that the negligence of the plaintiff was equal to or greater than that of the defendant or defendants. On the other hand, special verdict forms 9:26C and D, 9:27C and D, and 9:28C and D require the jury to determine the amount of plaintiff's damages only when the jury has determined that the negligence of the plaintiff was less than the negligence of the defendant or defendants. Neither set of special verdict forms require the jury to determine the amount of plaintiff's damages in cases where the jury has determined that there was no negligence on the part of the defendant or defendants. See **Dickinson v. Lincoln Bldg. Corp.**, 2015 COA 170M, ¶ 27, 378 P.3d 797 (A plaintiff's comparative negligence and another's pro rata liability are



substantive defenses that function only to decrease the defendant's percentage of liability; comparative fault defenses are applicable only when there is first substantiated evidence that both parties are at fault.).

3. In cases involving multiple claims, Instruction 4:20 (model unified verdict form) may be used in lieu of or in conjunction with the special verdict forms in this chapter. However, under section 13-21-111.5(5), C.R.S., the trial court is required to "instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants." Therefore, regardless of which special verdict form is used, in negligence actions, where the comparative negligence or fault of the plaintiff is in issue, the jury must be instructed in accordance with either Instruction 9:26, 9:27, or 9:28.

## 9:22 ELEMENTS OF LIABILITY—COMPARATIVE NEGLIGENCE

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant was negligent; and
3. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your foreperson shall complete only Special Verdict Form A, and all jurors shall sign it.

On the other hand, if you find that all of these (*number*) statements have been proved, then your foreperson shall complete only Special Verdict Form B and he or she and all jurors shall sign it.

### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Whenever this instruction is given, Instruction 9:23 and Instruction 9:26, 9:27, or 9:28, together with the corresponding special verdict forms, must also be given.

3. The comparative negligence statute, § 13-21-111, C.R.S., applies "in any action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property" in which the comparative negligence of the plaintiff has been raised as a defense and there is evidence that would support a finding that both the plaintiff and the defendant were negligent and that such negligence caused the plaintiff's injuries. **DeBose v. Bear Valley Church of Christ**, 890 P.2d 214 (Colo. App. 1994), *rev'd on other grounds*, 928 P.2d 1315 (Colo. 1996); *see also Reid v. Berkowitz*, 2013 COA 110M, ¶ 52, 315 P.3d 185. When such evidence is lacking, comparative negligence instructions should not be given. **Kildahl v. Tagge**, 942 P.2d 1283 (Colo. App. 1997); **Morgan v. Bd. of Water Works**, 837 P.2d

300 (Colo. App. 1992); **Powell v. City of Ouray**, 32 Colo. App. 44, 507 P.2d 1101 (1973).

4. In a comparative negligence case, if the court directs a finding or verdict of negligence against one or more of the parties, the court must also instruct the jury as to the conduct on which the finding is based as well as any other conduct the jury could reasonably find constituted negligence, in order to permit the jury to make a proper comparison of such negligence with any negligence of other parties the jury may find. **Ricklin v. Smith**, 670 P.2d 1239 (Colo. App. 1983). Also in such cases, the applicable “mechanics for submitting” instruction and special verdict forms, *see* Instructions 9:26A-9:28D, must be appropriately modified.

5. To the extent one or more forms of contributory negligence may be a partial defense to a product liability claim based on negligence, the “comparative fault” statute applies rather than the comparative negligence statute. § 13-21-406(4), C.R.S.

6. Comparative negligence is a defense to willful and wanton negligence. **White v. Hansen**, 837 P.2d 1229 (Colo. 1992); **G.E.C. Minerals, Inc. v. Harrison W. Corp.**, 781 P.2d 115 (Colo. App. 1989). It is not, however, a defense to an intentional tort. **Carman v. Heber**, 43 Colo. App. 5, 601 P.2d 646 (1979); *see also* **Finnigan v. Sandoval**, 43 Colo. App. 219, 600 P.2d 123 (1979).

7. Generally, when there is evidence of negligence on the part of both the plaintiff and the defendant, the jury is responsible for deciding their comparative negligence. **Gordon v. Benson**, 925 P.2d 775 (Colo. 1996) (trial court must instruct on comparative negligence when evidence would support finding that both parties were at fault); **Holmes v. Gamble**, 655 P.2d 405 (Colo. 1982); **Reid**, 2013 COA 110M, ¶ 57 (comparative negligence instruction required where plaintiff, a veteran construction worker, worked on a dimly lit construction site, fell over debris, broke through stair railing, and landed three stories below, stating that “[a] plaintiff must be cognizant of the physical conditions and surroundings present when he or she acts or fails to act”); **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (comparative negligence instruction proper where plaintiffs and their children were injured in accident while passengers in an automobile driven by someone that plaintiffs knew or should have known was intoxicated, however, comparative negligence instruction based on theory that plaintiffs should have interfered with driver was not warranted); **Carlson v. Ferris**, 58 P.3d 1055 (Colo. App. 2002) (failure to fully use safety belt system not a proper consideration in determining comparative negligence), *aff’d on other grounds*, 85 P.3d 504 (Colo. 2003), and *overruled on other grounds by* **Trattler v. Citron**, 182 P.3d 674 (Colo. 2008); **Sheron v. Lutheran Med. Ctr.**, 18 P.3d 796 (Colo. App. 2000) (patient who committed suicide after being discharged from hospital could be found comparatively negligent in wrongful death action against health care providers); **Bennett v. Greeley Gas Co.**, 969 P.2d 754



(Colo. App. 1998) (trial court erred in not submitting issue of comparative negligence to jury); **Voight v. Colo. Mtn. Club**, 819 P.2d 1088 (Colo. App. 1991) (trial court erred in setting aside jury verdict and determining as a matter of law that plaintiff was as negligent as defendant). *But see* **Huntoon v. TCI Cablevision of Colo., Inc.**, 969 P.2d 681 (Colo. 1998) (trial court acted properly in refusing to submit issue of comparative negligence to jury).

8. “[A] plaintiff’s comparative fault should not be reduced based on the number of defendants liable for damages.” **Ferrer v. Okbamicael**, 2017 CO 14M, ¶ 38, 390 P.3d 836, 846-47. For example, “[i]n a motor vehicle accident, comparative fault as it applies to the plaintiff should end with the parties to the accident. A plaintiff’s comparative negligence remains the same, regardless of whether the remaining fault can be allocated in part to the employer based on negligent entrustment.” *Id.* (alteration in original) (quoting **Gant v. L.U. Transp., Inc.**, 770 N.E.2d 1155, 1159 (Ill. App. Ct. 2002)). “Thus, if a plaintiff is fifty percent at fault in an accident, her comparative negligence should not be diminished simply because the portion of fault for which she is not responsible may be attributed to two defendants instead of one.” *Id.*

9. An employer who acknowledges vicarious liability for an employee’s negligence is strictly liable for the employee’s negligence “regardless of the ‘percentage of fault’ as between the party whose negligence directly caused the injury and the one whose liability for negligence is derivative.” **Ferrer**, 2017 CO 14M, ¶ 37, 390 P.3d at 846 (citation omitted). The employer is “responsible for *all* the fault attributed to the negligent employee, but *only* the fault attributed to the negligent employee as compared to the other parties to the accident.” *Id.* (citation omitted).

10. If a hospital admits a person into its custody who the hospital knows is actively suicidal for the purpose of preventing that person’s self-destructive behavior, the hospital assumes a duty to use reasonable care in preventing the patient from engaging in self-harm, and the patient is not comparatively negligent for engaging in self-harm. **P.W. v. Children’s Hosp. Colo.**, 2016 CO 6, ¶ 25, 364 P.3d 891. A defendant may not raise a defense of comparative negligence as a matter of law if, under the circumstances, the plaintiff “did all he was legally required to do,” and had no duty to do more. **Ringsby Truck Lines, Inc. v. Bradfield**, 193 Colo. 151, 154, 563 P.2d 939, 942 (1977).

11. Punitive damages are not subject to reduction on the basis of assigned fault under comparative negligence and pro rata liability statutes. **Lira v. Davis**, 832 P.2d 240 (Colo. 1992).

12. In cases under the Federal Employers Liability Act, 45 U.S.C.A. §§ 51 to -60 (2018), a special verdict dealing with comparative negligence is not required by statute or necessity, though a special verdict or interrogatories accompanying a general verdict may be used. If used, the

forms should be specifically prepared to conform to the applicable federal law. **Felder v. Union Pac. R.R.**, 660 P.2d 911 (Colo. App. 1982).

13. Notwithstanding the provisions of the comparative negligence statute, § 13-21-111, and the proportionate liability statute, § 13-21-111.5, C.R.S., the assumption of inherent risks by a spectator of a professional baseball game may be a complete defense against liability in an action for injuries by a spectator against an owner of a professional baseball team or stadium. *See* § 13-21-120, C.R.S. Whenever, in light of the evidence in the case, this complete defense might be applicable, an instruction based on the provisions of section 13-21-120 should be given if supported by sufficient evidence. And, if the defense of comparative negligence might be applicable to a claim of negligence not covered by this complete defense, then the instruction covering this defense and the instructions covering the defense of comparative negligence must be worded so as to avoid confusing the jury.

14. To be effective as a defense, any negligence on the plaintiff's part must have been a proximate cause of his injuries or losses. **Roberts v. Fisher**, 169 Colo. 288, 455 P.2d 871 (1969); **Matt Skorey Packard Co. v. Canino**, 142 Colo. 411, 350 P.2d 1069 (1960).

15. The principles of comparative negligence apply as a defense to a claim for damages under the Drug Dealer Liability Act, §§ 13-21-801 to -813, C.R.S., from a defendant who made illegal drugs available to an illegal user when the use of such drugs caused damages to the plaintiff. *See* § 13-21-806(1), C.R.S. Under section 13-21-806(2), however, that defense must be established by clear and convincing evidence. In such cases, this instruction and related comparative negligence instructions, appropriately modified as necessary, may be used.

16. A defendant who is negligent per se is not precluded from raising comparative negligence as a defense. **Lyons v. Nasby**, 770 P. 2d 1250 (Colo. 1989); *accord* **May v. Petersen**, 2020 COA 75, ¶ 21, 465 P.3d 589 (section 42-4-807, C.R.S., which requires motorists to exercise due care, and section 42-4-808(1), C.R.S., which requires a vehicle to stop and take certain precautions when it approaches an individual who has an obviously apparent disability, may provide a basis for negligence per se, but do not foreclose the defense of comparative negligence); **McCall v. Meyers**, 94 P.3d 1271 (Colo. App. 2004) (section 42-4-808, C.R.S., which directs motor vehicle drivers to stop and take necessary precautions to avoid accidents with disabled pedestrians, did not eliminate comparative negligence as a defense in negligence action by injured pedestrian against driver of motor vehicle).

### Source and Authority

This instruction is supported by section 13-21-111, and the authorities cited above.

**9:23 AFFIRMATIVE DEFENSE—COMPARATIVE  
NEGLIGENCE OF THE PLAINTIFF**

The affirmative defense of the comparative negligence of the plaintiff, (*name*), is proved if you find all of the following:

1. The plaintiff was negligent; and
2. The negligence of the plaintiff was a cause of the plaintiff's own claimed (injuries) (damages) (losses).

**Notes on Use**

1. See Notes on Use to Instruction 9:22.
2. Contributory or comparative negligence is an affirmative defense. C.R.C.P. 8(c); **Stevens v. Strauss**, 147 Colo. 547, 364 P.2d 382 (1961) (citing earlier cases); **Dickinson v. Lincoln Bldg. Corp.**, 2015 COA 170M, ¶ 25, 378 P.3d 797.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.



## 9:24 AFFIRMATIVE DEFENSE—NEGLIGENCE OR FAULT OF DESIGNATED NONPARTY

**The affirmative defense of the (negligence) (or) (fault) of the nonparty, (*insert name or other appropriate description*), is proved if you find all of the following:**

- 1. (*insert name or other appropriate description of the nonparty*) was (negligent) (or) (at fault); and**
- 2. The (negligence) (or) (fault) of (*insert name or other appropriate description of the nonparty*) was a cause of the plaintiff's claimed (injuries) (damages) (losses).**

### Notes on Use

1. This instruction must be given whenever Instruction 9:28 or Instruction 9:29 is given and either instruction includes references to a nonparty properly identified or designated under section 13-21-111.5(3)(b), C.R.S. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with the requirements of section 13-21-111.5(3). **Thompson v. Colorado & E. R.R.**, 852 P.2d 1328 (Colo. App. 1993). Nonparties need not have been engaged in the same kind of tortious conduct as the defendant in order to be properly designated. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). Generally, a person or entity designated under section 13-21-111.5, must have owed a duty recognized by law to the injured party. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995).

2. If a defendant properly identifies a nonparty under section 13-21-111.5(3)(b), and the plaintiff does not bring that nonparty into the lawsuit, the defendant bears the burden of proving the nonparty's negligence and causation. **Suydam v. LFI Fort Pierce, Inc.**, 2020 COA 144M, ¶ 44, 490 P.3d 930. The defendant's failure to give proper statutory notice of the nonparty does not preclude a defendant, however, from contending at trial that the defendant was not negligent or that the plaintiff's damages were not caused, actually or proximately, by the defendant's negligence. **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001); *see also* **Danko v. Conyers**, 2018 COA 14, ¶ 21, 432 P.3d 958. In these circumstances the name or other identification of any nonparty whose conduct may be involved will not appear on the verdict form for an allocation of negligence or fault, and this instruction should not be given. *See* **Thompson**, 852 P.2d at 1330.

3. Whenever this instruction is given, numbered paragraph 2 of Instruction 3:1 (defining preponderance of evidence) must be retained in that instruction when it is given.

4. Use whichever parenthesized words are appropriate. When the parenthesized word “fault” is used, another instruction defining what that term means in the context of the case must be given.

5. Even when a defendant is vicariously liable for the acts or omissions of another defendant or designated nonparty at fault under the nondelegable-duty doctrine, the jury should be instructed to determine the respective shares of fault of the vicariously liable defendant and any other defendants and/or nonparties at fault. However, in entering judgment, the court should aggregate the fault of the vicariously liable defendant and any other defendants and/or nonparties at fault for whom the defendant is vicariously liable. **Reid v. Berkowitz**, 2013 COA 110M, ¶ 39, 315 P.3d 185; *see also* **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1996) (while property owner was entitled to designate independent maintenance contractor as nonparty at fault, because of property owner’s nondelegable duty of care, plaintiff would be entitled to instruction on remand that negligence of contractor must be imputed to property owner). In Colorado, liability may be imputed under various legal theories, including respondeat superior, *see* Chapter 8 (Liability Based on Agency and Respondeat Superior), the inherently dangerous activity doctrine, *see* **Huddleston v. Union Rural Elec. Ass’n**, 841 P.2d 282 (Colo. 1992); Instruction 9:7 (inherently dangerous activities), and the nondelegable or independent duty doctrine, *see* **Springer v. City & Cty. of Denver**, 13 P.3d 794 (Colo. 2000).

6. A defendant is not entitled to a nonparty at fault instruction identifying a nonparty who, if brought into the action, would be liable only vicariously for the negligence or fault of another. **Just In Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, 383 P.3d 1, *rev’d in part on other grounds*, 2016 CO 47M, 374 P.3d 443; *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (physician, to whom liability for a surgical nurse’s negligence was imputed under the “captain of the ship” doctrine, is not a joint tortfeasor and cannot apportion some of the plaintiff’s damages to the nurse).

### Source and Authority

This instruction is supported by section 13-21-111.5(1), (2), and (3)(b). *See also* **Union Pac. R.R. v. Martin**, 209 P.3d 185, 189 n.3 (Colo. 2009).

## 9:25 NEGLIGENCE OF PARENTS NOT IMPUTABLE TO CHILDREN

**The negligence, if any, of a parent, as a parent, cannot be charged to his or her child.**

### Notes on Use

This instruction does not apply and should not be given or should not be given without being appropriately modified when there is sufficient evidence of another relationship on the basis of which the parent's negligence may be imputable to the child, for example, joint venture. *See* Instructions in Chapter 7 and in Chapter 11, Part C.

### Source and Authority

1. This instruction is supported by **Public Service Co. v. Petty**, 75 Colo. 454, 226 P. 297 (1924) (citing **Denver City Tramway Co. v. Brown**, 57 Colo. 484, 143 P. 364 (1914)). *See also* **Francis v. Dahl**, 107 P.3d 1171 (Colo. App. 2005); **Fletcher v. Porter**, 754 P.2d 788 (Colo. App. 1988).

2. However, the fact that a parent's negligence cannot be imputed to his or her child does not preclude a defendant from designating a child-plaintiff's parent as a nonparty at fault under section 13-21-111.5, C.R.S. **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (defendant may designate minor plaintiff's parent as nonparty at fault notwithstanding parental immunity).



## 9:26 COMPARATIVE NEGLIGENCE OF PLAINTIFF—SINGLE DEFENDANT—NO DESIGNATED NONPARTY INVOLVED

If you find the plaintiff, (*name*), was damaged and that the plaintiff's damages were caused by both the negligence of the plaintiff, (*name*), and the defendant, (*name*), then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.

If you find that both the plaintiff and the defendant were negligent and that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, then the plaintiff will not be allowed to recover.

On the other hand, if you find that both the plaintiff and the defendant were negligent and that the negligence of the defendant was greater than the negligence of the plaintiff, then the plaintiff will be allowed to recover.

If the plaintiff is allowed to recover, the total damages you award will be reduced by the Court by the percentage of the plaintiff's negligence.

### Notes on Use

1. See Notes on Use to Instruction 9:22 and Special Note to Part C of this Chapter 9.

2. In cases involving a single defendant and no counterclaim, this instruction should be preceded by Instruction 9:22 and given in conjunction with either Instructions 9:26A and B or Instructions 9:26C and D. See Special Note to Part C of this Chapter 9. If there is a counterclaim, a separate set of similar instructions, with plaintiff and defendant reversed, should be given.

3. In actions involving multiple defendants but not involving a designated nonparty, Instructions 9:27 and either 9:27A and B or 9:27C and D should be used in conjunction with Instruction 9:22, appropriately modified. In actions involving either a single defendant or multiple defendants and one or more nonparties of whom notice has been

properly given under section 13-21-111.5, C.R.S., Instruction 9:28, in conjunction with Instructions 9:28A and B or Instructions 9:28C and D and Instruction 9:22, appropriately modified, should be used rather than this instruction.

4. Section 13-21-111.5(5) requires the trial court to “instruct the jury on the effect of its finding as to the degree or percentage of negligence or fault as between the plaintiff or plaintiffs and the defendant or defendants. However, the jury shall not be informed as to the effect of its finding as the allocation of fault among two or more defendants. . . .” Under an earlier version of this statute, it was reversible error for the trial court to not instruct the jury on the effect of its finding as to the relative negligence of the parties, even though no such instruction was requested by counsel. **Appelgren v. Agri Chem, Inc.**, 39 Colo. App. 158, 562 P.2d 766 (1977).

5. In any case in which (a) there is more than one plaintiff, or (b) a cross-claim is also being litigated, or (c) any negligence on the plaintiff's part could only be found by the jury to have been a proximate cause of part of his or her damages, the otherwise applicable comparative negligence instructions must be appropriately modified. In particular, where there are two or more plaintiffs and (1) there is sufficient evidence for a reasonable jury to find contributory negligence on the part of one plaintiff, but not the other, and (2) there is no basis for imputing such possible contributory negligence of the one plaintiff to the other, this instruction, as well as the appropriate special verdict instructions, must be modified to make it clear to the jury that they are to consider (and compare if they find it to exist) only the possible negligence of the plaintiff whose conduct constitutes sufficient evidence of contributory negligence.

6. Only the negligence of those who have been made parties or those properly designated as nonparties should be compared; the negligence of a tortfeasor who has not been made a party or properly designated as a nonparty should not be included. *See, e.g., Nat'l Farmers Union Prop. & Cas. Co. v. Frackelton*, 662 P.2d 1056 (Colo. 1983); *Suydam v. LFI Fort Pierce, Inc.*, 2020 COA 144M, ¶ 45, 490 P.3d 930; *Thompson v. Colo. & E. R.R.*, 852 P.2d 1328 (Colo. App. 1993) (negligence of nonparty cannot be considered unless nonparty is properly designated in pleading that complies with section 13-21-111.5(3)).

### Source and Authority

This instruction is supported by sections 13-21-111 and 13-21-111.5.

**9:26A SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
COMPARATIVE NEGLIGENCE OF THE  
PLAINTIFF—SINGLE DEFENDANT—NO  
DESIGNATED NONPARTY**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required.

1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?
2. Was the defendant, (*name*), negligent?
3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

If your answer to any one or more of the above three questions is "no," then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if your answer to all three questions is "yes," then you shall answer these questions as well as the following questions on Special Verdict Form B and all jurors shall sign it.

4. Was the plaintiff, (*name*), negligent?
5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)?
6. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

- a. What is the total amount of plaintiff's dam-



ages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer “0” if you determine there were none.

- b. What is the total amount of plaintiff’s damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer “0” if you determine there were none.
- (c. What is the total amount of plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)

If your answer to all five questions 1, 2, 3, 4, and 5 is “yes,” then you shall also answer the following question 7 on Special Verdict Form B.

7. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff’s (injuries) (damages) (losses), what percentage of the negligence was the defendant’s and what percentage was the plaintiff’s?

#### Notes on Use

1. Instructions 6:1 (personal injuries) and 9:22 should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, and 9:22 are applicable to this instruction, along with the Special Note to Part C of this Chapter 9.

2. The parenthesized language in the first sentences of paragraphs 6a, 6b, and 6c of this instruction should only be given if there is sufficient evidence from which it can be inferred with a reasonable degree

of probability that physical impairment or disfigurement has been sustained.

3. Omit the parenthesized clause in numbered question 6 unless some evidence of negligent conduct on the part of a person other than the plaintiff or the defendant has been brought into the case.

4. Whenever this instruction is given, the two verdict forms set out in Instruction 9:26B must also be used.

5. Insert any other questions which may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of the defendant.

6. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

### Source and Authority

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:26B SPECIAL VERDICT FORMS—COMPARATIVE  
NEGLIGENCE OF THE PLAINTIFF—NO  
COUNTERCLAIM—SINGLE  
DEFENDANT—NO DESIGNATED  
NONPARTY—FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM A</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT  
FORM A IF YOUR FOREPERSON HAS COMPLETED  
AND ALL JURORS HAVE SIGNED SPECIAL VER-  
DICT FORM B.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (dam-  
ages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name*), negligent? (Yes or  
No)**

**ANSWER: \_\_\_\_\_**

**3. Was the defendant's negligence, if any, a cause  
of any of the (injuries) (damages) (losses) claimed by  
the plaintiff? (Yes or No)**



**ANSWER:** \_\_\_\_\_

We, the jury, having answered one or more of the above three questions "no," find the issues for the defendant, (name).

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Form B:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM B</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED SPECIAL VERDICT FORM A.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

**1. Did the plaintiff, (name), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**2. Was the defendant, (name), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**4. Was the plaintiff, (name), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**6. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

- a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (insert number of the applicable Instruction on damages). You should answer "0" if you determine there were none.**

**ANSWER: \_\_\_\_\_**

- b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of**

**Instruction** (*insert number of applicable Instruction on damages*). You should answer “0” if you determine there were none.

**ANSWER:** \_\_\_\_\_

- (c. What is the total amount of plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)

**ANSWER:** \_\_\_\_\_

Answer the following question 7 only if your answer to all five questions 1, 2, 3, 4, and 5 is “yes.”

7. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff’s (injuries) (damages) (losses), what percentage of the negligence was the defendant’s and what percentage was the plaintiff’s?

**ANSWER:** \_\_\_\_\_

Percentage charged to defendant, (name): \_\_\_\_\_%

Percentage charged to plaintiff, (name): \_\_\_\_\_%

**MUST TOTAL: 100%**

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Notes on Use**

See the Notes on Use to Instruction 9:26A and the Special Note to Part C of this Chapter 9.



# Source and Authority

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:26C SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
COMPARATIVE NEGLIGENCE OF THE  
PLAINTIFF—NO COUNTERCLAIM—  
SINGLE DEFENDANT—NO  
DESIGNATED NONPARTY  
(ALTERNATIVE TO INSTRUCTION  
9:26A)**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required.

1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?
2. Was the defendant, (*name*), negligent?
3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

If your answer to any one or more of the above three questions is "no," then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if your answer to all three questions is "yes," then you shall answer these questions as well as the following questions on Special Verdict Form B and all jurors shall sign it.

4. Was the plaintiff, (*name*), negligent?
5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)?

If your answer to all five questions 1, 2, 3, 4, and 5 is "yes," then you shall also answer the following question 6 on Special Verdict Form B. Otherwise skip question 6 and go on to question 7.

6. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff's (injuries) (damages) (losses), what percentage of the negligence was the defendant's and what percentage was the plaintiff's?

If you determine that the negligence of the plaintiff was equal to or greater than the negligence of the defendant, i.e., 50% or more, then skip question 7.

7. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

- a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.
- b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer "0" if you determine there were none.
- (c. What is the total amount of plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)



### Notes on Use

See the Notes on Use to Instructions 9:26 and 9:26A, and the Special Note to Part C of this Chapter 9.

### Source and Authority

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:26.

**9:26D SPECIAL VERDICT FORMS—COMPARATIVE  
NEGLIGENCE OF THE PLAINTIFF—NO  
COUNTERCLAIM—SINGLE  
DEFENDANT—NO DESIGNATED  
NONPARTY—FORMS A AND B  
(ALTERNATIVE TO INSTRUCTION  
9:26B)**

**Form A:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT
	)	FORM A
_____	)	
Defendant.	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED AND ALL  
JURORS HAVE SIGNED SPECIAL VERDICT FORM  
B.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (dam-  
ages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name*), negligent? (Yes or  
No)**

**ANSWER: \_\_\_\_\_**

3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

We, the jury, having answered one or more of the above three questions "no," find the issues for the defendant, (name).

Signatures of all jurors:

_____	_____
_____	Foreperson
_____	_____

Form B:

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT
	)	FORM B
_____	)	
Defendant.	)	

DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED SPECIAL VERDICT FORM A.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, (name), have (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_



2. Was the defendant, *(name)*, negligent? (Yes or No)

ANSWER: \_\_\_\_\_

3. Was the defendant's negligence, if any, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

4. Was the plaintiff, *(name)*, negligent? (Yes or No)

ANSWER: \_\_\_\_\_

5. Was the plaintiff's negligence, if any, a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

Answer the following question 6 only if your answer to all five questions 1, 2, 3, 4, and 5 is "yes." Otherwise, skip question 6 and go on to question 7.

6. Taking as 100 percent the combined negligence of the defendant and the plaintiff that caused the plaintiff's (injuries) (damages) (losses), what percentage of the negligence was the defendant's and what percentage was the plaintiff's?

ANSWER: \_\_\_\_\_

Percentage charged to defendant, *(name)*: \_\_\_\_\_%

Percentage charged to plaintiff, *(name)*: \_\_\_\_\_%

MUST TOTAL: 100%

Answer the following question 7 only if you have determined that the negligence of the plaintiff was less than that of the defendant, i.e., under 50%.

7. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of the defendant, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

- a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.

ANSWER: \_\_\_\_\_

- b. What is the total amount of plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer "0" if you determine there were none.

ANSWER: \_\_\_\_\_

- (c. What is the total amount of plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

ANSWER: \_\_\_\_\_

Signatures of all jurors:

**Foreperson**

**Notes on Use**

See the Notes on Use to Instructions 9:26 and 9:26A, and the Special Note to Part C of this Chapter 9.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:26.



**9:27 COMPARATIVE NEGLIGENCE OF THE PLAINTIFF—MULTIPLE DEFENDANTS—NO DESIGNATED NONPARTY INVOLVED**

If you find the plaintiff, (*name*), was damaged and that the plaintiff's damages were caused by the negligence of the plaintiff and one or more of the defendants, (*names*), or that the plaintiff's damages were caused by more than one of the defendants, then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.

If you find that the plaintiff and one or more of the defendants were negligent and that the negligence of the plaintiff was equal to or greater than the combined negligence of all the defendants, then the plaintiff will not be allowed to recover.

If you find that the plaintiff and one or more of the defendants were negligent and that the negligence of any one defendant or the combined negligence of more than one of the defendants was greater than the negligence of the plaintiff, then the plaintiff will be allowed to recover as against each of the defendants found negligent.

If the plaintiff is allowed to recover, the total damages you award will be reduced by the Court by the percentage of the plaintiff's negligence.

**Notes on Use**

The Notes on Use to Instructions 9:22 and 9:23 are generally applicable to this instruction. *See also* Special Note to Part C of this Chapter 9.

**Source and Authority**

1. This instruction is supported by **Mountain Mobile Mix, Inc. v. Gifford**, 660 P.2d 883 (Colo. 1983) (negligence of multiple defendants is to be combined and compared with negligence of plaintiff); and sections 13-21-111 and 13-21-111.5, C.R.S.

2. As to the rights of joint tortfeasors, as between themselves, see the Uniform Contribution Among Tortfeasors Act, §§ 13-50.5-101 to -106, C.R.S. See also **LB Rose Ranch, LLC v. Hansen Constr., Inc.**, 2019 COA 141, ¶ 1, 477 P.3d 739 (under section 13-50.5-105(1)(b), C.R.S., the second of two tortfeasors was required to pay contribution to the first tortfeasor, representing the second tortfeasor's share of damages for which they were jointly liable in tort; the release that the second tortfeasor received from the plaintiffs did not discharge its contribution liability to the first tortfeasor); **Graber v. Westaway**, 809 P.2d 1126 (Colo. App. 1991) (a party held liable for damages in prior tort litigation is not precluded from bringing action for contribution against joint tortfeasor who was not joined or designated in prior action).

**9:27A SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
COMPARATIVE NEGLIGENCE OF THE  
PLAINTIFF—MULTIPLE  
DEFENDANTS—NO DESIGNATED  
NONPARTY**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?

2. Was the defendant, (*name of first defendant*), negligent?

3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

4. Was the defendant, (*name of second defendant*), negligent?

5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

If you find that the plaintiff, (*name*), did not have (injuries) (damages) (losses), or if you find that none of the defendants was negligent or that no defendant's negligence was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer questions 1



through 5 as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

6. Was the plaintiff, *(name)*, negligent?

7. Was the negligence, if any, of the plaintiff a cause of *(his)* *(her)* own claimed *(injuries)* *(damages)* *(losses)*?

8. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of any one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction *(insert number of the applicable Instruction on damages)*. You should answer "0" if you determine there were none.

b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction *(insert number of applicable Instruction on damages)*. You should answer "0" if you determine there were none.

(c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

9. Taking as 100 percent the combined negligence of all parties you find were negligent and whose

**negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first defendant*), and of the plaintiff, (*name*)?**

**You must enter the figure of zero, "0," for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).**

### Notes on Use

1. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, 9:22, and 9:23 are applicable to this instruction, along with Special Note to Part C of this Chapter 9.

2. Whenever this instruction is given, the verdict forms in Instruction 9:27B must also be given.

3. Omit the parenthesized clause in numbered question 8 unless some evidence of negligent conduct on the part of a person other than the plaintiff or the defendants has been brought into the case.

4. If a claim of liability against one defendant is based only upon that defendant's vicarious liability for the negligence of another (e.g., an employer-employee relationship), this instruction must be appropriately modified.

5. Insert any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

6. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority, pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

### Source and Authority

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:27B SPECIAL VERDICT FORMS—COMPARATIVE  
NEGLIGENCE OF THE PLAINTIFF—  
MULTIPLE DEFENDANTS—NO  
DESIGNATED NONPARTY—FORMS A  
AND B**

## Form A:

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

<div style="text-align: center; font-weight: bold; font-size: 1.2em;">Plaintiff,</div>	)	
	)	
v.	)	<div style="font-weight: bold; font-size: 1.2em;">SPECIAL VERDICT</div>
	)	<div style="font-weight: bold; font-size: 1.2em;">FORM A</div>
<div style="text-align: center; font-weight: bold; font-size: 1.2em;">Defendant.</div>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED SPECIAL  
VERDICT FORM B AND ALL JURORS HAVE SIGNED  
IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**2. Was the defendant, (name of first defendant), negligent? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**3. Was the negligence, if any, of the defendant, (name of first defendant), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**



ANSWER: \_\_\_\_\_

4. Was the defendant, (*name of second defendant*), negligent? (Yes or No)

ANSWER: \_\_\_\_\_

5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

We, the jury, find for the defendants and award no damages to the plaintiff, (*name*).

Signatures of all jurors:

_____	_____
_____	Foreperson
_____	_____
_____	_____

Form B:

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT
	)	FORM B
_____	)	
Defendant.	)	

DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

2. Was the defendant, *(name of first defendant)*, negligent? (Yes or No)

ANSWER: \_\_\_\_\_

3. Was the negligence, if any, of the defendant, *(name of first defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

4. Was the defendant, *(name of second defendant)*, negligent? (Yes or No)

ANSWER: \_\_\_\_\_

5. Was the negligence, if any, of the defendant, *(name of second defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

If you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:

6. Was the plaintiff, *(name)*, negligent? (Yes or No)

ANSWER: \_\_\_\_\_

7. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

8. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

- a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of *Instruction* (insert number of the applicable *Instruction* on damages). You should answer "0" if you determine there were none.

ANSWER: \$ \_\_\_\_\_

- b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of *Instruction* (insert number of applicable *Instruction* on damages). You should answer "0" if you determine there were none.

ANSWER: \$ \_\_\_\_\_

- c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

ANSWER: \$ \_\_\_\_\_



9. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, *(name of first defendant)*, of the defendant, *(name of second defendant)*, and of the plaintiff, *(name)*? Enter the figure of zero, "0," for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

**ANSWER:**

Percentage charged to \_\_\_\_\_%  
*(name of first defendant):*

Percentage charged to \_\_\_\_\_%  
*(name of second defendant):*

Percentage charged to \_\_\_\_\_%  
 plaintiff, *(name):*

**MUST TOTAL: 100%**

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Notes on Use**

See the Notes on Use to Instruction 9:27A and the Special Note to Part C of this Chapter 9.

**Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:27C SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
COMPARATIVE NEGLIGENCE OF THE  
PLAINTIFF—MULTIPLE  
DEFENDANTS—NO DESIGNATED  
NONPARTY (ALTERNATIVE TO  
INSTRUCTION 9:27A)**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?
2. Was the defendant, *(name of first defendant)*, negligent?
3. Was the negligence, if any, of the defendant, *(name of first defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?
4. Was the defendant, *(name of second defendant)*, negligent?
5. Was the negligence, if any, of the defendant, *(name of second defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that none of the defendants was negligent or that no defendant's negligence was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on

**Special Verdict Form B you shall answer questions 1 through 5 as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.**

**6. Was the plaintiff, *(name)*, negligent?**

**7. Was the negligence, if any, of the plaintiff a cause of *(his)* *(her)* own claimed *(injuries)* *(damages)* *(losses)*?**

**8. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff's *(injuries)* *(damages)* *(losses)*, what percentage of negligence, if any, was that of the defendant, *(name of first defendant)*, of the defendant, *(name of second defendant)*, and of the plaintiff, *(name)*?**

**You must enter the figure of zero, "0," for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's *(injuries)* *(damages)* *(losses)*.**

**If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the defendants, i.e., 50% or more, then skip question 9.**

**9. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of one or more of the defendants, whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).**

**a. What is the total amount of plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction *(insert number of the applicable Instruc-***



tion on damages). You should answer “0” if you determine there were none.

- b. What is the total amount of plaintiff’s damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (insert number of applicable Instruction on damages). You should answer “0” if you determine there were none.
- (c. What is the total amount of plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)

#### Notes on Use

1. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, 9:22, and 9:23 are also applicable to this instruction. *See also* Special Note to Part C of this Chapter.

2. Whenever this instruction is given, the verdict forms in Instruction 9:27D must also be given.

3. Omit the parenthesized clause in numbered question 9 unless some evidence of negligent conduct on the part of a person other than the plaintiff or the defendants has been brought into the case.

4. If a claim of liability against one defendant is based only upon that defendant’s vicarious liability for the negligence of another (e.g., an employer-employee relationship), this instruction must be appropriately modified.

5. Insert any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

6. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

#### Source and Authority

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:27D SPECIAL VERDICT FORMS—COMPARATIVE  
NEGLIGENCE OF THE PLAINTIFF—  
MULTIPLE DEFENDANTS—NO  
DESIGNATED NONPARTY—FORMS A  
AND B (ALTERNATIVE TO  
INSTRUCTION 9:27B)**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM A</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED SPECIAL  
VERDICT FORM B AND ALL JURORS HAVE SIGNED  
IT.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (dam-  
ages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first defendant*),  
negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant,  
(*name of first defendant*), a cause of any of the (injuries)**

(damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

4. Was the defendant, (*name of second defendant*), negligent? (Yes or No)

ANSWER: \_\_\_\_\_

5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

We, the jury, find for the defendants and award no damages to the plaintiff, (*name*).

Signatures of all jurors:

_____	_____
	Foreperson
_____	_____
_____	_____

Form B:

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT
	)	FORM B
_____	)	
Defendant.	)	

DO NOT ANSWER THIS SPECIAL VERDICT FORM B



**IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No) \_\_\_\_\_**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first defendant*), negligent? (Yes or No) \_\_\_\_\_**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No) \_\_\_\_\_**

**ANSWER: \_\_\_\_\_**

**4. Was the defendant, (*name of second defendant*), negligent? (Yes or No) \_\_\_\_\_**

**ANSWER: \_\_\_\_\_**

**5. Was the negligence, if any, of the defendant, (*name of second defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No) \_\_\_\_\_**

**ANSWER: \_\_\_\_\_**

**If you find that the plaintiff did have (injuries) (damages) (losses) and you further find that one or more of the defendants was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:** \_\_\_\_\_

6. Was the plaintiff, *(name)*, negligent? (Yes or No)

ANSWER: \_\_\_\_\_

7. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

8. Taking as 100 percent the combined negligence of all parties you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, *(name of first defendant)*, of the defendant, *(name of second defendant)*, and of the plaintiff, *(name)*?

Enter the figure of zero, "0," for any party you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

ANSWER:

Percentage charged to \_\_\_\_\_%  
*(name of first defendant):*

Percentage charged to \_\_\_\_\_%  
*(name of second defendant):*

Percentage charged to \_\_\_\_\_%  
plaintiff, *(name)*:

MUST TOTAL: 100%

If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the defendants, i.e., 50% or more, then skip question 9.

9. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence of one or more of the defendants,

whether the damages were also caused by the negligence, if any, of the plaintiff (or anyone else).

- a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (insert number of the applicable Instruction on damages). You should answer "0" if you determine there were none.

ANSWER: \$\_\_\_\_\_

- b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (insert number of applicable Instruction on damages). You should answer "0" if you determine there were none.

ANSWER: \$\_\_\_\_\_

- (c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

ANSWER: \$\_\_\_\_\_

Signatures of all jurors:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Foreperson

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



### Notes on Use

See the Notes on Use to Instruction 9:27A and the Special Note to Part C of this Chapter 9.

### Source and Authority

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22.

**9:28 COMPARATIVE NEGLIGENCE OF  
PLAINTIFF—SINGLE DEFENDANT OR  
MULTIPLE DEFENDANTS—  
DESIGNATED NONPARTY OR  
NONPARTIES INVOLVED**

If you find the plaintiff, *(name)*, was damaged and that the plaintiff's damages were caused by the negligence of the plaintiff and (one or more of the defendants, *[names]*, and *[insert name or other appropriate description of designated nonparty]*) (the defendant, *[name]*, and *[insert name or other appropriate description of designated nonparty]*) (one or more of the defendants, *[names]*, and *[insert names or other appropriate description of designated nonparties]*) (the defendant, *[name]*, and *[insert names or other appropriate description of designated nonparties]*) or that the plaintiff's damages were caused by more than one of the defendants, then you must determine to what extent the negligent conduct of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.

If you find that the plaintiff and (one or more of the defendants, *[names]*, and *[insert name or other appropriate description of designated nonparty]*) (the defendant, *[name]*, and *[insert name or other appropriate description of designated nonparty]*) (one or more of the defendants, *[names]*, and *[insert names or other appropriate description of designated nonparties]*) (the defendant, *[name]*, and *[insert names or other appropriate description of designated nonparties]*) were negligent and that the negligence of the plaintiff was equal to or greater than the combined negligence of (the defendant) (all the defendants) and (the designated nonparty) (all of the designated nonparties), then the plaintiff will not be allowed to recover.

On the other hand, if you find that the negligence of the plaintiff was less than the combined negligence of (the defendant) (all the defendants) and (the designated nonparty) (all of the designated nonparties), then the plaintiff will be allowed to recover.

If the plaintiff is allowed to recover, the total damages you award will be reduced by the Court by the percentage of the plaintiff's negligence and by the percentage of the negligence of the designated (nonparty) (nonparties).

### Notes on Use

1. The Notes on Use to Instructions 9:22, 9:23, and 9:24 are generally applicable to this instruction. *See also* Special Note to Part C of this Chapter 9. Use whichever parenthesized and bracketed phrases are applicable.

2. This instruction along with Instructions 9:28A and B or Instructions 9:28C and D and Instruction 9:22, appropriately modified, should be used in actions, in which there is a single defendant or multiple defendants and notice of one or more designated nonparties has been properly given under section 13-21-111.5(3)(b), C.R.S. In such actions, under section 13-21-111.5(2), the "jury shall return a special verdict, or, in the absence of a jury, the court shall make special findings determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) . . . to whom some negligence or fault is found . . . ."

3. For the instructions dealing with cases involving the claimed negligence or fault of a designated nonparty, but not involving any negligence or fault of the plaintiff, see Instructions 9:29 and 9:29A and B.

4. When otherwise applicable, this instruction should be given with Instruction 15:18 (elements of liability for attorneys).

5. Where a settlement is reached with one or more parties, the damages awarded are reduced by the percentage of fault attributed to the settling designated nonparties. **Smith v. Zufelt**, 880 P.2d 1178 (Colo. 1994); **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1996) (even though negligence of independent contractor, who settled prior to trial, was imputable to defendant, independent contractor was properly designated as nonparty at fault).

6. Section 13-21-111.5(1) limits the scope of the pro rata liability statute to only "those actions 'brought as a result of a death or an injury to person or property.'" **Broderick v. McElroy & McCoy, Inc.**, 961 P.2d 504, 507 (Colo. App. 1997).

7. Even when a defendant is vicariously liable for the acts or omissions of another defendant or designated nonparty at fault under the nondelegable-duty doctrine, the jury should be instructed to determine



the respective shares of fault of the vicariously liable defendant and any other defendants and/or nonparties at fault. However, in entering judgment, the court should aggregate the fault of the vicariously liable defendant and any other defendants and/or nonparties at fault for whom the defendant is vicariously liable. **Reid v. Berkowitz**, 2013 COA 110M, ¶ 39, 315 P.3d 185; *see also* **Kidwell**, 942 P.2d at 1283 (while property owner was entitled to designate independent maintenance contractor as nonparty at fault, because of property owner's nondelegable duty of care, plaintiff would be entitled to instruction on remand that negligence of contractor must be imputed to property owner). In Colorado, vicarious liability may be imputed under various legal theories, including respondeat superior, *see* Chapter 8 (Liability Based on Agency and Respondeat Superior), the inherently dangerous activity doctrine, *see* **Huddleston v. Union Rural Elec. Ass'n**, 841 P.2d 282 (Colo. 1992) and Instruction 9:7 (inherently dangerous activities), and the nondelegable or independent duty doctrine, *see* **Springer v. City & County of Denver**, 13 P.3d 794 (Colo. 2000).

8. A defendant is not entitled to a nonparty at fault instruction identifying a nonparty who, if brought into the action, would be liable only vicariously for the negligence or fault of another. **Just In Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, 383 P.3d 1, *rev'd in part on other grounds*, 2016 CO 47M, 374 P.3d 443; *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (physician, to whom liability for a surgical nurse's negligence was imputed under the "captain of the ship" doctrine, is not a joint tortfeasor and cannot apportion some of the plaintiff's damages to the nurse).

### Source and Authority

1. This instruction is supported by section 13-21-111.5(5), and the authorities cited in the Notes on Use above.

2. Under Colorado's pro rata liability statute, § 13-21-111.5, C.R.S., unidentified or unknown persons may be designated as nonparties. **Pedge v. R.M. Holdings, Inc.**, 75 P.3d 1126 (Colo. App. 2002). Also, persons who commit intentional torts can be designated as nonparties. **Slack v. Farmers Ins. Exch.**, 5 P.3d 280 (Colo. 2000); **Pedge**, 75 P.3d at 1128.

3. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with the requirements of section 13-21-111.5(3). **B.G.'s, Inc. v. Gross**, 23 P.3d 691 (Colo. 2001); **Pedge**, 75 P.3d at 1128; **Thompson v. Colo. & E. R.R.**, 852 P.2d 1328 (Colo. App. 1993). Nonparties need not have engaged in the same kind of tortious conduct as the defendant in order to be properly designated. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). However, generally, a person or entity designated under section 13-21-111.5 must have owed a duty recognized by law to the injured party. **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995); *see also* **Fried v. Leong**, 946

P.2d 487 (Colo. App. 1997) (when plaintiff seeks damages for aggravation of a preexisting condition, liability cannot be prorated among nonparties whose conduct merely created that preexisting condition nor can liability be prorated among nonparties who breached no duty to the plaintiff, even though their conduct contributed to aggravation of preexisting condition). And liability may be apportioned between a defendant and a designated nonparty only if admissible evidence has been presented showing that the nonparty contributed to plaintiff's injuries. **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997).

4. The negligence of multiple defendants or designated nonparties is to be combined and compared with the negligence of the plaintiff. Damages are recoverable by the plaintiff from the defendants found liable unless the negligence attributable to the plaintiff is 50% or greater. **Mountain Mobile Mix, Inc. v. Gifford**, 660 P.2d 883 (Colo. 1983). As to the liability of individual defendants, however, in contrast to prior case law and statutes, under section 13-21-111.5(1), "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence . . . attributable to such defendant that produced the claimed injury, death, damage or loss," whether such negligence was greater or lesser, on an individual comparative basis, than the plaintiff's, another defendant's, or that of a designated nonparty. See **Inland/Riggle Oil Co. v. Painter**, 925 P.2d 1083 (Colo. 1996) (where plaintiff's negligence was less than the combined negligence of all of the defendants and designated nonparties, a defendant whose negligence was less than that of plaintiff was, nevertheless, liable for its pro rata share of the damages awarded).

**9:28A SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
COMPARATIVE NEGLIGENCE OF THE  
PLAINTIFF—SINGLE DEFENDANT OR  
MULTIPLE DEFENDANTS—  
DESIGNATED NONPARTY OR  
NONPARTIES INVOLVED**

**You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:**

**1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?**

**2. Was the defendant, *(name of first or only defendant)*, negligent?**

**3. Was the negligence, if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**(4. Was the defendant, *(name of second defendant)*, negligent?)**

**(5. Was the negligence, if any, of the defendant, *[name of second defendant]*, a cause of the [injuries] [damages] [losses] claimed by the plaintiff?)**

**If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants was) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.**

**On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a**



cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

6. Was *(name or other appropriate description of first or only designated nonparty)* **negligent?**

7. Was the negligence, if any, of *(name or other appropriate description of first or only designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

8. Was *(name or other appropriate description of second designated nonparty)* **negligent?**

9. Was the negligence, if any, of *(name or other appropriate description of second designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

10. Was the plaintiff, *(name)*, **negligent?**

11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?

12. State your answers to the questions as they appear on Special Verdict Form B relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any, of the (nonparty) (nonparties), *(name or names or other appropriate description)*.

13. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, *(name of first or only defendant)*, (of the defendant, *[name of second defendant]*), of the (nonparty) (nonpar-

ties), *(name or names or other appropriate description)*, and of the plaintiff, *(name)*?

**You must enter the figure of zero, “0,” for any party or nonparty you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff’s claimed (injuries) (damages) (losses).**

#### **Notes on Use**

1. This instruction is for use in cases, in which (a) there is one defendant and one or more designated nonparties of whom notice has been properly given under section 13-21-111.5(3)(b), C.R.S., or (b) there are two or more defendants and one or more designated nonparties of whom proper notice has been given.

2. Use whichever parenthesized and bracketed words and phrases are appropriate, and modify the instruction appropriately if proper notice has been given of more than one nonparty.

3. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, 9:22, 9:23, and 9:24 are generally applicable to this instruction, along with the Special Note to Part C of this Chapter 9.

4. This instruction must be used with Instruction 9:28B.

5. If a claim of liability against a defendant is based only upon that defendant’s vicarious liability for the negligence of another (e.g., an employer-employee relationship), this instruction must be appropriately modified.

6. Insert any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

7. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

#### **Source and Authority**

This instruction is supported by the authorities cited in the Notes on Use to Instruction 9:22, and the Notes on Use to Instruction 9:24. The provisions relating to the determination of percentages of negligence of parties and nonparties is based on section 13-21-111.5(2).

**9:28B SPECIAL VERDICT FORMS—COMPARATIVE  
NEGLIGENCE OF THE PLAINTIFF—  
SINGLE DEFENDANT OR MULTIPLE  
DEFENDANTS—DESIGNATED  
NONPARTY OR NONPARTIES  
INVOLVED—FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR  
THE COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM A</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED SPECIAL  
VERDICT FORM B AND ALL JURORS HAVE SIGNED  
IT.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (dam-  
ages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defen-  
dant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant,  
(*name of first or only defendant*), a cause of any of the**



(injuries) (damages) (losses) claimed by the plaintiff?  
 (Yes or No)

ANSWER: \_\_\_\_\_

(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]

ANSWER: \_\_\_\_\_)

(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

Signatures of all jurors:

_____	_____
_____	Foreperson
_____	_____

**Form B:**

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
 Civil Action No. \_\_\_\_\_

_____	)
Plaintiff,	)
	)
v.	)
	)
_____	)
Defendant.	)

**SPECIAL VERDICT  
 FORM B**

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B**

**IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

2. Was the defendant, (*name of first or only defendant*), negligent? (Yes or No)

ANSWER: \_\_\_\_\_

3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]

ANSWER: \_\_\_\_\_)

(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:

6. Was (name or other appropriate description of first or only designated nonparty) negligent? (Yes or No)

ANSWER: \_\_\_\_\_

7. Was the negligence, if any, of (name or other appropriate description of first or only designated nonparty) a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

(8. Was [name or other appropriate description of second designated nonparty] negligent? [Yes or No]

ANSWER: \_\_\_\_\_)

(9. Was the negligence, if any, of [name or other appropriate description of second designated nonparty] a cause of any of the [injuries]] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

10. Was the plaintiff, (name), negligent? (Yes or No)

ANSWER: \_\_\_\_\_

11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

12. State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any of the (nonparty) (nonparties), (name or names or other appropriate description):

a. What is the total amount of the plaintiff's dam-



ages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (*insert number of the applicable Instruction on damages*). You should answer “0” if you determine there were none.

ANSWER: \$\_\_\_\_\_

- b. What is the total amount of the plaintiff's damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer “0” if you determine there were none.

ANSWER: \$\_\_\_\_\_

- (c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.)

ANSWER: \$\_\_\_\_\_

13. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (*name of first or only defendant*), (of the defendant, [*name of second defendant*],) (of the nonparty, [*name or other appropriate description of first or only nonparty*]), (of the nonparty, [*name or other appropriate description of second nonparty*]) and of the plaintiff, (*name*)? Enter the figure zero, “0,” for any party or nonparty you decide was not negligent or whose

negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).

**ANSWER:**

Percentage charged to \_\_\_\_\_%  
(name of first or only defendant):

Percentage charged to \_\_\_\_\_%  
(name of second defendant):

Percentage charged to \_\_\_\_\_%  
(name of first or only nonparty):

Percentage charged to \_\_\_\_\_%  
(name of second nonparty):

Percentage charged to \_\_\_\_\_%  
plaintiff, (name):

**MUST TOTAL: 100%**

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

**Notes on Use**

See the Notes on Use to Instruction 9:28A and the Special Note to Part C of this Chapter 9.

**Source and Authority**

This instruction is supported by sections 13-21-111, 13-21-111.5, and 13-21-102.5, C.R.S.

**9:28C SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
COMPARATIVE NEGLIGENCE OF THE  
PLAINTIFF—SINGLE DEFENDANT OR  
MULTIPLE DEFENDANTS—  
DESIGNATED NONPARTY OR  
NONPARTIES INVOLVED  
(ALTERNATIVE TO INSTRUCTION  
9:28A)**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)?

2. Was the defendant, (*name of first or only defendant*), negligent?

3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

(4. Was the defendant, [*name of second defendant*], negligent?)

(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of the [injuries] [damages] [losses] claimed by the plaintiff?)

If you find that the plaintiff, (*name*), did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants was) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further



find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

6. Was *(name or other appropriate description of first or only designated nonparty)* **negligent?**

7. Was the negligence, if any, of *(name or other appropriate description of first or only designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

8. Was *(name or other appropriate description of second designated nonparty)* **negligent?**

9. Was the negligence, if any, of *(name or other appropriate description of second designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

10. Was the plaintiff, *(name)*, **negligent?**

11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?

12. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, *(name of first or only defendant)*, (of the defendant, *[name of second defendant]*), of the (nonparty) (nonparties), *(name or names or other appropriate description)*, and of the plaintiff, *(name)*?

You must enter the figure of zero, "0," for any party or nonparty you decide was not negligent or

whose negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).

If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the (defendant) (defendants) and the (non-party) (nonparties), i.e., 50% or more, then skip question 13.

13. State your answers to the questions as they appear on Special Verdict Form B relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any, of the (nonparty) (nonparties), *(name or names or other appropriate description)*.

#### Notes on Use

See the Notes on Use to Instruction 9:28A, and the Special Note to Part C of this Chapter 9.

#### Source and Authority

This instruction is supported by the authorities cited in the Source and Authority to Instruction 9:28A.

**9:28D SPECIAL VERDICT FORMS—COMPARATIVE NEGLIGENCE OF THE PLAINTIFF—SINGLE DEFENDANT OR MULTIPLE DEFENDANTS—DESIGNATED NONPARTY OR NONPARTIES INVOLVED—FORMS A AND B (ALTERNATIVE TO INSTRUCTION 9:28B)**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM A</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM B AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, *(name of first or only defendant)*, negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant,**



(*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]

ANSWER: \_\_\_\_\_)

(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (*name*).

Signatures of all jurors:

\_\_\_\_\_  
 \_\_\_\_\_ Foreperson  
 \_\_\_\_\_  
 \_\_\_\_\_

Form B:

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
 Civil Action No. \_\_\_\_\_

\_\_\_\_\_  
 Plaintiff,  
 \_\_\_\_\_  
 v.  
 \_\_\_\_\_  
 Defendant.

SPECIAL VERDICT  
 FORM B

DO NOT ANSWER THIS SPECIAL VERDICT FORM B

**IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defendant*), negligent? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the negligence, if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], negligent? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**(5. Was the negligence, if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

6. Was (name or other appropriate description of first or only designated nonparty) negligent? (Yes or No)

ANSWER: \_\_\_\_\_

7. Was the negligence, if any, of (name or other appropriate description of first or only designated nonparty) a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

(8. Was [name or other appropriate description of second designated nonparty] negligent? [Yes or No]

ANSWER: \_\_\_\_\_)

(9. Was the negligence, if any, of [name or other appropriate description of second designated nonparty] a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

10. Was the plaintiff, (name), negligent? (Yes or No)

ANSWER: \_\_\_\_\_

11. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER: \_\_\_\_\_

12. Taking as 100 percent the combined negligence of all parties and (any nonparty) you find were negligent and whose negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence, if any, was that of the defendant, (name of first or only defendant), (of the defendant, [name of second defendant],) (of the nonparty, [name or



*other appropriate description of first or only nonparty]), (of the nonparty, [name or other appropriate description of second nonparty]) and of the plaintiff, (name)? Enter the figure zero, "0," for any party or nonparty you decide was not negligent or whose negligence you decide was not a cause of any of the plaintiff's claimed (injuries) (damages) (losses).*

**ANSWER:**

Percentage charged to \_\_\_\_\_%  
(name of first or only defendant):

Percentage charged to \_\_\_\_\_%  
(name of second defendant):

Percentage charged to \_\_\_\_\_%  
(name of first or only nonparty):

Percentage charged to \_\_\_\_\_%  
(name of first or only nonparty):

Percentage charged to \_\_\_\_\_%  
plaintiff, (name):

**MUST TOTAL: 100%**

If you determine that the negligence of the plaintiff was equal to or greater than the combined negligence of the (defendant) (defendants) and the (nonparty) (nonparties), i.e., 50% or more, then skip question 13.

**13.** State your answers to the following questions relating to the plaintiff's damages that were caused by the negligence, if any, of the parties to this lawsuit and the negligence, if any, of the (nonparty) (nonparties), (name or names or other appropriate description):

- a. What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of Instruction (insert number of the applicable Instruc-

*tion on damages*). You should answer “0” if you determine there were none.

ANSWER: \$ \_\_\_\_\_

- b. What is the total amount of the plaintiff’s damages, if any, for economic losses (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of Instruction (*insert number of applicable Instruction on damages*). You should answer “0” if you determine there were none.

ANSWER: \$ \_\_\_\_\_

- (c. What is the total amount of the plaintiff’s damages, if any, for [physical impairment] [or] [disfigurement]? You should answer “0” if you determine there were none.

ANSWER: \$ \_\_\_\_\_)

**Signatures of all jurors:**

_____	_____
_____	<b>Foreperson</b>
_____	_____

### Notes on Use

See the Notes on Use to Instruction 9:28A, and the Special Note to Part C of this Chapter 9.

### Source and Authority

This instruction is supported by the authorities cited in the Source and Authority to Instruction 9:28A.

**9:29 ELEMENTS—MULTIPLE DEFENDANTS OR  
ONE OR MORE DEFENDANTS AND ONE  
OR MORE DESIGNATED  
NONPARTIES—NO NEGLIGENCE OR  
FAULT OF PLAINTIFF**

**If you find that the plaintiff, *(name)*, had (injuries) (damages) (losses) and that the plaintiff's damages were caused by the (negligence) (or) (fault) of *(insert appropriate following phrase):***

**(two or more of the defendants, *[names]*,)**

**(one or more of the defendants, *[names]*, and that of the nonparty, *[name or other appropriate description]*,)**

**(the defendant, *[name]*, and that of the nonparty, *[name or other appropriate description]*,)**

**then you must determine to what extent the (negligence) (or) (fault) of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent.**

**Notes on Use**

1. This instruction, based on section 13-21-111.5, C.R.S., applies only in civil actions, "brought as a result of a death or an injury to person or property," in which there is no, or insufficient, evidence of the plaintiff's contributory negligence or fault, but there is sufficient evidence that the plaintiff's damages were caused, in whole or in part, by the negligence or fault of (1) two or more defendants, (2) one defendant and one or more designated nonparties of whom notice has been properly given under section 13-21-111.5(3)(b), or (3) two or more defendants and one or more designated nonparties of whom proper notice has been given. If there is sufficient evidence of negligence or fault on the plaintiff's part, Instruction 9:22 appropriately modified, if necessary, to cover any relevant form of fault other than, or in addition to, negligence, should be used rather than this instruction.

2. Use whichever parenthesized words are appropriate. When the parenthesized word "fault" is used, another instruction defining what that term means in the context of the case must be given.

3. Whenever this instruction is given, Instructions 9:29A and B must also be given, as well as Instruction 9:24 if proper notice of a nonparty has been given under section 13-21-111.5(3)(b).



4. If notice has been properly given of more than one designated nonparty, this instruction and its accompanying “mechanics for submitting” and “special verdict forms” instructions, *see* Instructions 9:29A and B, must be appropriately modified.

5. This instruction, as well as its accompanying Instructions 9:29A and B, must be appropriately modified if there is sufficient evidence that two or more persons consciously conspired and deliberately pursued “a common plan or design to commit a tortious act,” in which case they are to be held jointly liable. § 13-21-111.5(4). Absent a showing of concerted action, however, the trier of fact must apportion negligence or fault between tortfeasors. **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993).

6. Similarly, this instruction and Instructions 9:29A and B must be appropriately modified if a claim of liability of any defendant or designated nonparty is based on vicarious liability alone or in conjunction with another claim based on personal liability.

7. The negligence or fault of a nonparty cannot be considered unless the nonparty has been properly designated by the defendant in a pleading that complies with the requirements of section 13-21-111.5(3). **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001); **Thompson v. Colorado & E. R.R.**, 852 P.2d 1328 (Colo. App. 1993). Nonparties need not have engaged in the same kind of tortious conduct as the defendant in order to be properly designated. **Moody v. A.G. Edwards & Sons, Inc.**, 847 P.2d 215 (Colo. App. 1992). However, it is not proper to designate a nonparty where the moving defendant fails to establish a prima facie case that the nonparty owed and breached a legal duty to the plaintiff. **Stone v. Satriana**, 41 P.3d 705 (Colo. 2002); **Redden**, 38 P.3d at 81. Immunity from suit does not preclude the nonparty from being designated under section 13-21-111.5. **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (defendant may designate minor plaintiff’s parent as nonparty at fault notwithstanding parental immunity).

8. Section 13-21-111.5(1), limits the scope of the pro rata liability statute to only “those actions ‘brought as a result of a death or an injury to person or property.’” **Broderick v. McElroy & McCoy, Inc.**, 961 P.2d 504, 507 (Colo. App. 1997) (trial court not required to instruct on pro rata liability in action by vendors against brokers for breach of contract and breach of fiduciary duty). Section 13-21-111.5 is limited to tort claims and therefore does not apply to contract-based claims. **Core-Mark Midcontinent, Inc. v. Sonitrol Corp.**, 2012 COA 120, ¶ 47, 300 P.3d 963.

9. Even when a defendant is vicariously liable for the acts or omissions of another defendant or designated nonparty at fault under the nondelegable-duty doctrine, the jury should be instructed to determine the respective shares of fault of the vicariously liable defendant and any other defendants and/or nonparties at fault. However, in entering judg-

ment, the court should aggregate the fault of the vicariously liable defendant and any other defendants and/or nonparties at fault for whom the defendant is vicariously liable. **Reid v. Berkowitz**, 2013 COA 110M, ¶ 39, 315 P.3d 185; *see also* **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1996) (while property owner was entitled to designate independent maintenance contractor as nonparty at fault, because of property owner's nondelegable duty of care, plaintiff would be entitled to instruction on remand that negligence of contractor must be imputed to property owner). In Colorado, vicarious liability may be imputed under various legal theories, including respondeat superior, *see* Chapter 8 (Liability Based on Agency and Respondeat Superior), the inherently dangerous activity doctrine, *see* **Huddleston v. Union Rural Elec. Ass'n**, 841 P.2d 282 (Colo. 1992), and Instruction 9:7 (inherently dangerous activities), and the nondelegable or independent duty doctrine, *see* **Springer v. City & Cty. of Denver**, 13 P.3d 794 (Colo. 2000).

10. A defendant is not entitled to a nonparty at fault instruction identifying a nonparty who, if brought into the action, would be liable only vicariously for the negligence or fault of another. **Just In Case Bus. Lighthouse, LLC v. Murray**, 2013 COA 112M, 383 P.3d 1, *rev'd in part on other grounds*, 2016 CO 47M, 374 P.3d 443; *see also* **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009) (physician, to whom liability for a surgical nurse's negligence was imputed under the "captain of the ship" doctrine, is not a joint tortfeasor and cannot apportion some of the plaintiff's damages to the nurse).

### Source and Authority

This instruction is supported by section 13-21-111.5, which states that, "(1) . . . no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury, death, damage, or loss . . . [,] (2) [t]he jury shall return a special verdict . . . determining the percentage of negligence or fault attributable to each of the parties and any persons not parties to the action of whom notice has been given pursuant to paragraph (b) of subsection (3) . . . to whom some negligence or fault is found and determining the total amount of damages sustained by each claimant." *See, e.g., Bohrer v. DeHart*, 961 P.2d 472 (Colo. 1998) (error for trial court not to instruct on pro rata liability of defendants, but error was harmless where court instructed jury to divide total damages between culpable defendants in proportional amounts and jury followed court's instructions).



**9:29A SPECIAL VERDICT QUESTIONS—  
MECHANICS FOR SUBMITTING—  
MULTIPLE DEFENDANTS OR ONE OR  
MORE DEFENDANTS AND ONE OR  
MORE DESIGNATED NONPARTIES—NO  
NEGLIGENCE OR FAULT OF PLAINTIFF**

You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:

1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?

2. Was the defendant, *(name of first or only defendant)*, (negligent) (or) (at fault)?

3. Was the (negligence) (or) (fault), if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

(4. Was the defendant, *[name of second defendant]*, [negligent] [or] [at fault]?)

(5. Was the [negligence] [or] [fault], if any, of the defendant, *[name of second defendant]*, a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff?)

If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants was) (negligent) (or) (at fault) or that no (negligence) (or) (fault) (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and all jurors shall sign it.

On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further



find that (the defendant) (one or more of the defendants) was (negligent) (or) (at fault) and that such (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer the following questions, and your foreperson shall complete only Special Verdict Form B, and all jurors shall sign it.

6. Was (*name or other appropriate description of designated nonparty*) (negligent) (or) (at fault)?

7. Was the (negligence) (or) (fault), if any, of (*name or other appropriate description of designated nonparty*) a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

8. State your answers to the questions as they appear on Special Verdict Form B relating to the plaintiff's damages that were caused by the (negligence) (or) (fault) of the (defendant) (one or more of the defendants) and the (negligence) (or) (fault), if any, of the nonparty, (*name or other appropriate description*).

9. Taking as 100 percent the combined (negligence) (or) (fault) of the (defendant) (defendants) and (any nonparty) you find were (negligent) (or) (at fault) and whose (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of (negligence) (or) (fault), if any, was that of the defendant, (*name of first or only defendant*), (of the defendant, [*name of second defendant*],) and of the nonparty, (*name or other appropriate description*)?

You must enter the figure of zero, "0," for the nonparty (and any defendant) you decide was not (negligent) (or) (at fault) or whose (negligence) (or) (fault) you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

### Notes on Use

1. Instruction 6:1 (personal injuries) should be used with this instruction. The Notes on Use to Instructions 4:4 (verdict form), 6:1, and 9:24 are also applicable to this instruction.

2. Whenever this instruction is given, the two verdict forms set out in Instruction 9:28B must also be given.

3. If the case involves only multiple defendants and no designated nonparties, this instruction and Instruction 9:29B must be appropriately modified.

4. Insert any other questions that may be necessary to resolve properly any other claims or affirmative defenses.

5. If, in a district court case, the parties have stipulated to a verdict or finding by some stated majority pursuant to C.R.C.P. 48, this instruction should be modified accordingly.

### Source and Authority

This instruction is supported by the authorities cited in the Notes on Use and Source and Authority to Instructions 9:24 and 9:29.

**9:29B SPECIAL VERDICT FORMS—MULTIPLE  
DEFENDANTS OR ONE OR MORE  
DEFENDANTS AND ONE OR MORE  
DESIGNATED NONPARTIES—NO  
NEGLIGENCE OR FAULT OF  
PLAINTIFF—FORMS A AND B**

**Form A:**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
Plaintiff,	)	
	)	
v.	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM A</b>
_____	)	
Defendant.	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED SPECIAL  
VERDICT FORM B AND ALL JURORS HAVE SIGNED  
IT.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (dam-  
ages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defen-  
dant*), (negligent) (or) (at fault)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the (negligence) (or) (fault), if any, of the  
defendant, (*name of first or only defendant*), a cause of**



any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER: \_\_\_\_\_

(4. Was the defendant, [name of second defendant], [negligent] [or] [at fault]? [Yes or No]

ANSWER: \_\_\_\_\_)

(5. Was the [negligence] [or] [fault], if any, of the defendant, [name of second defendant], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]

ANSWER: \_\_\_\_\_)

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

Signatures of all jurors:

_____	_____
	Foreperson
_____	_____
_____	_____

Form B:

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
	)	
v.	)	SPECIAL VERDICT
	)	FORM B
_____	)	
Defendant.	)	

DO NOT ANSWER THIS SPECIAL VERDICT FORM B

**IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (damages) (losses)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**2. Was the defendant, (*name of first or only defendant*), (negligent) (or) (at fault)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**3. Was the (negligence) (or) (fault), if any, of the defendant, (*name of first or only defendant*), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER: \_\_\_\_\_**

**(4. Was the defendant, [*name of second defendant*], [negligent] [or] [at fault]? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**(5. Was the [negligence] [or] [fault], if any, of the defendant, [*name of second defendant*], a cause of any of the [injuries] [damages] [losses] claimed by the plaintiff? [Yes or No]**

**ANSWER: \_\_\_\_\_)**

**If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was (negligent) (or) (at fault) and that such (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:**

**6. Was** (*name or other appropriate description of designated nonparty*) **(negligent) (or) (at fault)? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**7. Was the (negligence) (or) (fault), if any, of** (*name or other appropriate description of designated nonparty*) **a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)**

**ANSWER:** \_\_\_\_\_

**8. State your answers to the following questions relating to the plaintiff's damages that were caused by the (negligence) (or) (fault), if any, of the (defendant) (one or more of the defendants) and the (negligence) (or) (fault), if any, of the nonparty, (*name or other appropriate description*):**

- a. **What is the total amount of the plaintiff's damages, if any, for noneconomic losses or injuries** (, excluding any damages for [physical impairment] [or] [disfigurement])? Noneconomic losses or injuries are those losses or injuries described in numbered paragraph 1 of **Instruction** (*insert number of the applicable Instruction on damages*). You should answer "0" if you determine there were none.

**ANSWER:** \$ \_\_\_\_\_

- b. **What is the total amount of the plaintiff's damages, if any, for economic losses** (, excluding any damages for [physical impairment] [or] [disfigurement])? Economic losses are those losses described in numbered paragraph 2 of **Instruction** (*insert number of applicable Instruction on damages*). You should answer "0" if you determine there were none.

**ANSWER:** \$ \_\_\_\_\_



- (c. What is the total amount of the plaintiff's damages, if any, for [physical impairment] [or] [disfigurement]? You should answer "0" if you determine there were none.)

ANSWER: \$ \_\_\_\_\_

9. Taking as 100 percent the combined (negligence) (or) (fault) of the (defendant) (defendants) and nonparty you find were (negligent) (or) (at fault) and whose (negligence) (or) (fault) was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of (negligence) (or) (fault), if any, was that of the defendant, *(name of first or only defendant)*, (of the defendant, *[name of second defendant]*), and of the nonparty, *(name or other appropriate description)*? Enter the figure zero, "0," for the nonparty (and any defendant) you decide was not (negligent) (or) (at fault) or whose (negligence) (or) (fault) you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

ANSWER:

Percentage charged to \_\_\_\_\_%  
*(name of first or only defendant):*

Percentage charged to \_\_\_\_\_%  
*(name of second defendant):*

Percentage charged to \_\_\_\_\_%  
*(name of nonparty):*

MUST TOTAL: 100%

Signatures of all jurors:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Foreperson  
\_\_\_\_\_

#### Notes on Use

See Notes on Use to Instructions 9:24 and 9:29.

# Source and Authority

This instruction is supported by the authorities cited in the Notes on Use and Source and Authority to Instructions 9:24 and 9:29.

## D. WILLFUL AND WANTON NEGLIGENCE

### 9:30 WILLFUL AND WANTON CONDUCT OR WILLFUL AND RECKLESS DISREGARD— DEFINED

(“Willful and wanton conduct”) (“Wanton and reckless disregard of the rights and feelings of others”) means an act or omission purposefully committed by a person who must have realized that the conduct was dangerous, and which conduct was done heedlessly and recklessly, either without regard to the consequences, or without regard to the rights and safety of others, particularly the plaintiff.

#### Notes on Use

1. This instruction, using whichever parenthesized words are appropriate, should be used with Instruction 5:4 (exemplary or punitive damages).

2. When necessary, this instruction may also be used, with appropriate modifications, to define such phrases as “willful and wanton negligence,” “willful and reckless negligence,” etc.

#### Source and Authority

1. This instruction is supported by section 13-21-102(1)(b), C.R.S., which appears to be a codification of the three basic ideas common to “willful,” “wanton,” or “reckless” conduct that run through the cases: (1) the conduct must have created a higher-than-normal risk of harm; (2) the defendant must have been aware of the risk (i.e., acted purposefully); and (3) the defendant must have acted “heedlessly” (i.e., without justification) in disregard of the rights of others. *See also Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484 (Colo. 1986) (to justify award of punitive damages, act complained of must have been performed with such a wanton and reckless disregard of plaintiff’s rights as to evidence a “wrongful motive”); *Palmer v. A.H. Robins Co., Inc.*, 684 P.2d 187 (Colo. 1984) (purposely performed with an awareness of the risk); *Core-Mark Midcontinent, Inc. v. Sonitrol Corp.*, 2012 COA 120, ¶¶ 18-19, 300 P.3d 963 (discussing willful and wanton conduct under tort and contract law); *U.S. Fire Ins. Co. v. Sonitrol Mgmt. Corp.*, 192 P.3d 543, 549 (Colo. App. 2008) (evidence of burglar alarm monitoring company’s failures to respond to multiple automated alarm notifications of a burglary in progress was sufficient to support jury finding of “purposeful conduct committed recklessly with conscious disregard for the rights and safety of others”); *Forman v. Brown*, 944 P.2d 559, 564



(Colo. App. 1996) ("purposeful conduct committed recklessly that exhibits an intent consciously to disregard the safety of others"); **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993) (declining to apply a "knew or should have known" standard); **Messler v. Phillips**, 867 P.2d 128 (Colo. App. 1993); *see also* **Terror Mining Co. v. Roter**, 866 P.2d 929 (Colo. 1994); **Foster v. Redding**, 97 Colo. 4, 45 P.2d 940 (1935) (no material difference between phrase "willful and wanton" as used in guest statute (now repealed) and phrase "wanton and reckless" as used in exemplary damages statute); **Clark v. Small**, 80 Colo. 227, 250 P. 385 (1926) (punitive damages); **Jacobs v. Commonwealth Highland Theatres, Inc.**, 738 P.2d 6 (Colo. App. 1986) (punitive damages).

2. By way of analogy, section 18-1-501(8), C.R.S., defines "recklessly" in the criminal law using these same three basic ideas. "A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that a result will occur . . . ." One acts "willfully" under the Colorado Criminal Code "when he is aware that his conduct is practically certain to cause the result." § 18-1-501(6).

3. For cases decided under the former guest statute, *see* **Coffman v. Seifert**, 175 Colo. 224, 486 P.2d 422 (1971); **Brown v. Spain**, 171 Colo. 205, 466 P.2d 462 (1970); **Steeves v. Smiley**, 144 Colo. 5, 354 P.2d 1011 (1960) (consciously choosing a dangerous course of action with knowledge of facts that a reasonable person would recognize creates a strong probability of injury to others); **Hodges v. Ladd**, 143 Colo. 143, 352 P.2d 660 (1960) (intentionally disregarding symptoms of sleepiness); **Coffman v. Godsoe**, 142 Colo. 575, 351 P.2d 808 (1960) (citing and discussing several earlier cases); **Burrell v. Anderson**, 133 Colo. 386, 295 P.2d 1039 (1956) (negligence resulting from a passive mind is not willful and wanton negligence); **Graham v. Shilling**, 133 Colo. 5, 291 P.2d 396 (1955); **Pettingell v. Moede**, 129 Colo. 484, 271 P.2d 1038 (1954); and **Helgoth v. Foxhoven**, 125 Colo. 446, 244 P.2d 886 (1952) (citing several earlier cases).

4. Willful and wanton negligence may consist of either an act or an omission. **Millington v. Hiedloff**, 96 Colo. 581, 45 P.2d 937 (1935).

5. Comparative negligence is a defense to willful and wanton negligence. **White v. Hansen**, 837 P.2d 1229 (Colo. 1992); **G.E.C. Minerals, Inc. v. Harrison W. Corp.**, 781 P.2d 115 (Colo. App. 1989).

## **E. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS HAVE BEEN PREPARED**

### **9:31 CONTRIBUTORY NEGLIGENCE, CONTRIBUTORY NEGLIGENCE OF (SPOUSE) (PARENT) (CHILD), AND ASSUMPTION OF RISK**

**No separate instructions on these subjects have been prepared.**

#### **Notes**

1. The definition of “negligence” set forth in Instruction 9:6 is also applicable to define “contributory negligence,” and therefore, no separate instruction defining “contributory negligence” has been prepared.

2. Under the comparative negligence statute, § 13-21-111, C.R.S., although contributory negligence is a defense to a negligence claim, it may not be a complete defense, and therefore, in cases where contributory negligence is raised as a defense, use the applicable comparative negligence instructions in Part C of this chapter.

3. The contributory negligence of one spouse in causing injuries to the other spouse is a defense to the former’s claim for loss of consortium. *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 125, at 938 (5th ed. 1984). In such cases, use the applicable comparative negligence instructions, appropriately modified, in Part C of this chapter, together with Instructions 6:5 and 6:6 (loss of consortium), also appropriately modified.

4. While the negligence of a parent in proximately causing injuries to his or her child is a defense to that parent’s claim for loss of services, expenses, etc., *PROSSER AND KEETON ON THE LAW OF TORTS, supra*, § 125, at 938, it is not necessarily a complete bar under section 13-21-111. Therefore, in such cases, use the applicable comparative negligence instructions (Instructions 9:22-9:29), appropriately modified.

5. Even though the contributory negligence of a parent may bar or reduce the parent’s claim, such negligence will not be imputed to the child so as to bar or reduce the child’s claim. *See* Instruction 9:25. Similarly, in the absence of some other basis, such as master and servant, the contributory negligence of one parent or a spouse will not be imputed to the other parent so as to bar or reduce whatever claim the other parent may have for injuries to the child. *See Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 P. 460 (1912).

6. In cases where the contributory negligence of a child has been

raised as a defense, use Instruction 9:9, together with the applicable comparative negligence instructions in Part C of this chapter.

7. In Colorado, assumption of risk is a form of contributory negligence. **Wark v. McClellan**, 68 P.3d 574 (Colo. App. 2003) (instructions on assumption of risk as a form of contributory negligence may be given with instructions on comparative negligence where facts support such instructions). For this reason, a separate instruction on the defense of assumption of risk should not be given in a case governed by the comparative negligence statute, § 13-21-111. *See, e.g., Brown v. Kreuser*, 38 Colo. App. 554, 558, 560 P.2d 105, 108 (1977) (Instructions on contributory negligence, *see, e.g.,* Instruction 9:6, and on determining the “comparative negligence percentages of the plaintiff and the defendant [Instructions 9:22-9:29] sufficiently cover the conduct heretofore classed as assumption of risk in Colorado . . .”); *see also Loup-Miller v. Brauer & Assocs. Rocky Mtn., Inc.*, 40 Colo. App. 67, 572 P.2d 845 (1977); **Stefanich v. Martinez**, 39 Colo. App. 500, 570 P.2d 554 (1977), *aff’d on other grounds*, 195 Colo. 341, 577 P.2d 1099 (1978). In actions in which the statutory definition of assumption of risk under section 13-21-111.7, C.R.S., may be applicable when comparing negligence under the comparative negligence statute, § 13-21-111, Instruction 9:6 should be used.

8. Under section 13-21-120, C.R.S., the assumption of “inherent risks” by a spectator of a professional baseball game may be a complete defense against liability in an action by a spectator against an owner of a professional baseball team or stadium. Whenever, in light of the evidence in the case, this complete defense of assumption of risk might be applicable, an instruction based on the provisions of section 13-21-120, should be given if supported by sufficient evidence.



## F. SUBJECTS ON WHICH NO SEPARATE INSTRUCTIONS SHOULD BE GIVEN

### 9:32 RESCUE DOCTRINE, UNAVOIDABLE ACCIDENT, AND LAST CLEAR CHANCE

**No separate instructions on these subjects should be given.**

#### Notes

1. The usual instructions given in a negligence case, particularly those relating to causation, *see* Instructions 9:18-9:21, will normally cover adequately the cases in which the plaintiff is claiming damages for injuries incurred while rescuing or attempting to rescue another who was endangered or injured as a result of the claimed negligence of the defendant. For a discussion of the "Rescue Doctrine," *see* **Garcia v. Colo. Cab Co.**, 2020 CO 55, ¶¶ 14-33, 467 P.3d 302 (identifying and applying three factors in assessing whether a plaintiff can qualify as a rescuer: (1) the plaintiff's purpose in acting, (2) the plaintiff's reasonable belief that someone was in imminent peril, and (3) the utility of the plaintiff's conduct); *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 44, at 307-09 (5th ed. 1984), and *RESTATEMENT (SECOND) OF TORTS* § 294 (1965).

2. In **Lewis v. Buckskin Joe's, Inc.**, 156 Colo. 46, 396 P.2d 933 (1964), overruling several earlier cases, the court held it was error to give an unavoidable accident instruction in a negligence case.

3. The doctrine of last clear chance is logically subsumed under a comparative negligence statute such as Colorado's. *PROSSER AND KEETON ON THE LAW OF TORTS*, *supra*, § 67, at 477. *See also* *J. PALMER & S. FLANAGAN, COMPARATIVE NEGLIGENCE MANUAL* § 1.230 (rev. ed. 1986); *4 F. HARPER ET AL., HARPER, JAMES, AND GRAY ON TORTS* § 22.14 (3d ed. 1986). Therefore, the applicable comparative negligence instructions (Instructions 9:22-9:29), based on section 13-21-111, C.R.S., should be used rather than an instruction on last clear chance.

## CHAPTER 10. WRONGFUL DEATH

- 10:1 Contributory Negligence of a Decedent
- 10:2 Contributory Negligence of a Plaintiff
- 10:3 Damages for Wrongful Death
- 10:4 Wrongful Death of Child—Determining Pecuniary Loss

### 10:1 CONTRIBUTORY NEGLIGENCE OF A DECEDENT

If you find the decedent, (*name*), was negligent and such negligence either caused or contributed to the death of the decedent, then the negligence, if any, of the decedent is chargeable to the plaintiff(s), (*name[s]*).

#### Notes on Use

While the contributory negligence of a decedent is a defense in a wrongful death action, **Willy v. Atchison, Topeka & Santa Fe Ry.**, 115 Colo. 306, 172 P.2d 958 (1946) (construing what is now section 13-21-202, C.R.S.); RESTATEMENT (SECOND) OF TORTS § 494 (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 954 (5th ed. 1984), it is not necessarily a complete bar under section 13-21-111, C.R.S. For that reason, the applicable comparative negligence instructions (Instructions 9:22 and 9:26 through 9:28D), appropriately modified, should be used with this instruction.

#### Source and Authority

This instruction is supported by the authorities cited above in the Notes on Use.

## 10:2 CONTRIBUTORY NEGLIGENCE OF A PLAINTIFF

See Instructions 9:22 and 9:26 through 9:28D.

### Note

While the contributory negligence of a plaintiff is a defense in a wrongful death action as to that plaintiff's claim, **Phillips v. Denver City Tramway Co.**, 53 Colo. 458, 128 P. 460 (1912); **W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS** § 127, at 958 (5th ed. 1984), it is not necessarily a complete bar under section 13-21-111, C.R.S. For that reason, the applicable comparative negligence instructions (Instructions 9:22 and 9:26 to 9:28D), appropriately modified, if necessary, should be used. *But see* **Tanski v. Tanski**, 820 P.2d 1143 (Colo. App. 1991) (where husband of the decedent, in his capacity as surviving spouse and heir at law, sued himself for the wrongful death of his wife on the basis that his wife's death resulted from a one-car accident caused by his own negligence, public policy prohibited the plaintiff from recovering damages for a wrongful death which he, himself, negligently caused).



**10:3 DAMAGES FOR WRONGFUL DEATH**

Plaintiff, (*name*), has the burden of proving, by a preponderance of the evidence, the nature and extent of (his) (her) damages (and the damages of those the plaintiff represents). If you find in favor of the plaintiff, you must determine the total dollar amount of the damages, if any, of plaintiff (and those that plaintiff represents), that were caused by the (*insert appropriate description, e.g., "negligence"*) of the defendant(s), (*name[s]*), (and) (,) (the [*insert appropriate description, e.g., "negligence"*], if any, of [*name of decedent*]), (and) (the [*insert appropriate description, e.g., "negligence"*], if any, of any designated nonparties).

In determining such damages, you shall consider the following:

(1. Any noneconomic losses, including grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff [and those the plaintiff represents] [has] [have] had to the present, and any grief, loss of companionship, impairment of the quality of life, inconvenience, pain and suffering, and emotional stress the plaintiff [and those the plaintiff represents] will have in the future;) (and)

(2. Any economic losses, including reasonable funeral, burial, internment, or cremation expenses, and any net financial loss which the plaintiff has [and those the plaintiff represents have] had because of the death of [*name of decedent*]. The net financial loss is the same as the financial benefit the plaintiff [and those the plaintiff represents] might reasonably have expected to receive from [*name of decedent*] had [he] [she] lived.)

In determining these damages, if any, you should consider the age, health, and life expectancy of (*name of decedent*), the age, health, and life expectancy of the

plaintiff (and those the plaintiff represents), the (*name of decedent's*) industriousness, ability to earn money, willingness to assist the plaintiff (and those the plaintiff represents), and the nature of the relationship between (*name of decedent*) and the plaintiff (and between [*name of decedent*] and those the plaintiff represents).

#### Notes on Use

1. Use whichever parenthesized and bracketed words are appropriate.

2. This instruction should be used in actions brought under section 13-21-202, C.R.S. Recoverable damages under this statute include “damages for noneconomic loss or injury as defined in section 13-21-102.5 and subject to the limitations of [section 13-21-203] and including within noneconomic loss or injury damages for grief, loss of companionship, pain and suffering, and emotional stress.” § 13-21-203(1)(a), C.R.S. As an alternative to these noneconomic damages, a set amount may be recovered as a solatium under section 13-21-203.5, C.R.S. Consequently, if the plaintiff has elected this solatium, the parenthesized numbered paragraph 1 of this instruction must be omitted, and the solatium should be awarded “upon a finding or admission of the defendant’s liability for the wrongful death.” § 13-21-203.5. A solatium award is not subject to reduction by operation of the comparative fault statute, § 13-21-111, C.R.S., or by operation of the pro-rata liability statute, § 13-21-111.5, C.R.S. **B.G.’s, Inc. v. Gross**, 23 P.3d 691 (Colo. 2001); *see also* **Smith v. Vincent**, 77 P.3d 927 (Colo. App. 2003) (solatium award not subject to reduction by amount of insurance settlement payment from former defendant); **Dewey v. Hardy**, 917 P.2d 305 (Colo. App. 1995).

3. Under section 13-21-203(1)(a), recoverable damages for noneconomic loss or injury “shall not exceed the limitations for noneconomic loss or injury set forth in section 13-21-102.5, unless the wrongful act, neglect, or default causing death constitutes a felonious killing, as defined in section 15-11-803(1)(b), C.R.S., and as determined in the manner described in section 15-11-803(7), C.R.S., in which case there shall be no limitation on the damages for noneconomic loss or injury recoverable in such action.” *See also* **Estate of Wright ex rel. Wright v. United Servs. Auto. Ass’n**, 53 P.3d 683 (Colo. App. 2001) (notwithstanding disposition in prior criminal proceedings, when issue is raised, court must determine whether there was a felonious killing in wrongful death action); **Aiken v. Peters**, 899 P.2d 382 (Colo. App. 1995). In addition, under section 13-21-203(1)(b), the “damages recoverable for noneconomic loss or injury in any medical malpractice action shall not exceed the limitations on noneconomic loss or injury set forth in section 13-64-302.”

4. The limitations on noneconomic damages set forth in section 13-



21-203(1), and the amount of the solatium set forth in section 13-21-203.5, are to be adjusted periodically for inflation by the Colorado secretary of state. § 13-21-203.7, C.R.S. As of the most recent certification, on January 14, 2020, the secretary of state has certified the following adjusted limitations on these damages:

For all claims for relief that accrue on or after January 1, 1998, and before January 1, 2008:

§ 13-21-203(1), C.R.S., the adjusted limitation is \$341,250.

§ 13-21-203.5, C.R.S., the adjusted solatium amount is \$68,250.

For all claims for relief that accrue on and after January 1, 2008, and before January 1, 2020:

§ 13-21-203(1), C.R.S., the adjusted limitation is \$436,070.

§ 13-21-203.5, C.R.S., the adjusted solatium amount is \$87,210.

For all claims for relief that accrue on and after January 1, 2020:

§ 13-21-203(1), C.R.S., the adjusted limitation is \$571,870.

§ 13-21-203.5, C.R.S., the adjusted solatium amount is \$114,370.

For the most current information on these caps, see the secretary of state's website, [www.sos.state.co.us](http://www.sos.state.co.us).

5. When multiple plaintiffs bring a wrongful death action based on a decedent's death and the plaintiffs seek damages for noneconomic losses only, each plaintiff is not required to establish that he or she personally suffered damages for noneconomic losses to remain a party to the action. Though different heirs may suffer different noneconomic losses as a result of a decedent's death, each heir-plaintiff is not required to prove noneconomic losses. Whether damages are awarded for economic or noneconomic losses, all damages awarded are owned jointly and distributed through the statutes of descent and distribution. **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011) (citing section 13-21-201(2), C.R.S.; and **Steedle v. Sereff**, 167 P.3d 135 (Colo. 2007)).

6. A decedent's future tax liability must not be considered when calculating a plaintiff's net pecuniary loss in a wrongful death case. **Hoyal v. Pioneer Sand Co.**, 188 P.3d 716 (Colo. 2008).

7. In addition to the pecuniary losses recoverable under this instruction, funeral expenses may also be recoverable where the plaintiff has become obligated to pay them. See **Espinoza v. Gurule**, 144 Colo. 381,



356 P.2d 891 (1960) (action by parents for funeral expenses caused by wrongful death of son recognized as independent action apart from statute as property damage claim); **Publix Cab Co. v. Colo. Nat'l Bank**, 139 Colo. 205, 338 P.2d 702 (1959) (executor entitled to recover funeral expenses as separate property damage claim independent of death claim, and court notes that it is not required to rule on whether such expenses must be included in maximum statutory limits for wrongful death); **Dillon v. Sterling Rendering Works, Inc.**, 106 Colo. 407, 106 P.2d 358 (1940) (funeral expenses recoverable as part of death claim, and court did not determine whether independent right to recover funeral expenses existed).

8. Although punitive damages historically were not recoverable in wrongful death actions, *see, e.g.*, **Herbertson v. Russell**, 150 Colo. 110, 371 P.2d 422 (1962), since 2001 such damages have been recoverable under section 13-21-203(3)(a) and (b). This instruction applies to these claims, subject to the limitation that the amount of such damages shall not exceed the amount of actual damages, § 13-21-203(3)(a), and subject to the special pleading rules set out in section 13-21-203(3)(c), and the special substantive provisions set out in section 13-21-203(4)–(7).

9. The court should apply section 13-21-111.6, C.R.S., to the extent that section is applicable, to reduce any damages awarded by the jury. That section directs the court in any action “for a tort resulting in death or injury to person or property” to reduce the amount of damages awarded, before entering judgment, by the amount of certain collateral benefits received by the plaintiff, but not including collateral benefits paid “as a result of a contract entered into and paid for by or on behalf of such [injured] person.” However, this statute does not apply to a settlement payment from a joint tortfeasor. **Smith**, 77 P.3d at 930-31; *see* **Wal-Mart Stores, Inc. v. Crossgrove**, 2012 CO 31, ¶ 26, 276 P.3d 562, 568 (“The court of appeals correctly determined that the common law pre-verdict evidentiary component of the collateral source rule bars the admission of evidence of the amounts paid for medical services in collateral source cases.”); **Sunahara v. State Farm Mut. Auto. Ins. Co.**, 2012 CO 30M, ¶ 15, 280 P.3d 649, 655 (the “common law evidentiary component of the collateral source rule prohibits the admission of amounts paid evidence in collateral source cases, even for the purpose of determining the reasonable value of medical services rendered”); **Smith v. Jepps**, 2012 CO 32, ¶ 19, 277 P.3d 224 (upholding exclusion of pre-verdict admission of evidence of collateral benefits).

10. The Notes on Use to Instructions 6:1, 6:1A, and 6:1B are also applicable to this instruction.

11. When the plaintiff is suing not only on his or her own behalf, but also as a representative for other heirs under sections 13-21-201 and 13-21-203, the parenthetical phrase “and those the plaintiff represents” should be used to make it clear the plaintiff is entitled to recover damages sustained by all those entitled to share in any judgment. However, the limitation on noneconomic damages in section

13-21-203(1) applies on a per-claim basis, rather than on a per-defendant basis, capping a wrongful death plaintiff's aggregate recovery at the amount in section 13-21-102.5 regardless of the number of defendants against whom suit is brought. **Lanahan v. Chi Psi Fraternity**, 175 P.3d 97 (Colo. 2008).

12. In a wrongful death claim against a person or entity subject to the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, C.R.S., the statutory cap under section 24-10-114(1)(a), C.R.S., of the Act applies to limit the total recovery for the death. **Steedle v. Sereff**, 167 P.3d 135 (Colo. 2007). Likewise, in a wrongful death claim that is subject to the Ski Safety Act of 1979, §§ 33-44-101 to -114, C.R.S., the Act's damages cap limits the recovery of compensatory damages notwithstanding the application of the felonious killing exception to the wrongful death damages cap. **Stamp v. Vail Corp.**, 172 P.3d 437 (Colo. 2007). The Ski Safety Act's damages cap does not apply to an award of punitive damages in a wrongful death action. *Id.*

13. In cases arising under the Federal Tort Claims Act, to which Colorado substantive law is applicable, such substantive law includes any applicable statutory monetary limitations on recovery. **Bartch v. United States**, 330 F.2d 466 (10th Cir. 1964).

14. When the suit is one for the wrongful death of a child, Instruction 10:4 should be given with this instruction. In such cases, however, the last paragraph of this instruction should be omitted because the matters covered are included in the second paragraph of Instruction 10:4.

15. This instruction, with suitable modifications in the first paragraph, may be given in comparative negligence cases, *see* Instructions 9:22 and 9:26-9:28D, when any such instructions would otherwise be appropriate, for example, when there is sufficient evidence of contributory negligence on the part of the decedent or one or more of the plaintiffs.

16. In actions in which the negligence or fault of a nonparty has been properly put in issue under section 13-21-111.5(2) and (3)(b), as a cause, in whole or in part, of the plaintiff's claimed damages, the first paragraph of this instruction should be appropriately modified. For such cases, *see also* Instructions 9:29-9:29B.

17. In general, the word "heir" refers to "a person who inherits real or personal property." **Ferguson v. Spalding Rehab., LLC**, 2019 COA 93, ¶ 11, 456 P.3d 59, 61-62. But, the term "heirs" in section 13-21-201(1)(a), specifying who may sue for a wrongful death, refers only to the "lineal descendants" of a deceased and generally does not include the parents of the deceased. **McGill v. Gen. Motors Corp.**, 174 Colo. 388, 484 P.2d 790 (1971); **Whitenhill v. Kaiser Permanente**, 940 P.2d 1129 (Colo. App. 1997); **Potter v. Thieman**, 770 P.2d 1348 (Colo.



App. 1989). A lineal descendant is “[o]ne who is in the line of descent from the ancestor.” **Ferguson**, 2019 COA 93, ¶¶ 16–25, 456 P.3d at 62 (holding decedent’s adult adoptee a lineal descendant under the wrongful death act). But section 13-21-201(1)(c) provides standing for parents if the deceased is an unmarried minor without descendants or an unmarried adult without descendants and without a designated beneficiary. See **Whitenhill**, 940 P.2d at 1131. Whether the parent of a deceased adult has standing to bring a wrongful death action is determined as of the decedent’s date of death. **Hansen v. Barron’s Oilfield Serv.**, 2018 COA 132, ¶ 1, 429 P.3d 101 (parent of an adult deceased does not have standing to sue for wrongful death when the deceased was married at the time of her death). A designated beneficiary appointed under sections 15-22-101 to -112, C.R.S., may in some circumstances sue for wrongful death. See § 13-21-201(1)(a)(IV).

18. Section 13-21-203(1), prohibits successive wrongful death actions for the death of a decedent. **Estate of Kronmeyer v. Meinig**, 948 P.2d 119 (Colo. App. 1997) (trial court properly dismissed plaintiff’s wrongful death action where plaintiff had already settled previous action for the wrongful death of the same decedent). Because section 13-21-203(1) limits wrongful death claims to “only one civil action” for the death of a decedent, if venue is proper as to one defendant in a wrongful death action, it is proper as to all other co-defendants. **Hernandez v. Downing**, 154 P.3d 1068 (Colo. 2007) (trial court erred in granting co-defendant’s motion for severance and change of venue in wrongful death action). Under the “one civil action” limitation in section 13-21-203(1), a surviving spouse’s pre-litigation settlement of a wrongful death claim precludes another heir from bringing a later wrongful death action. **Barnhart v. Am. Furniture Warehouse Co.**, 2013 COA 158, ¶ 28, 338 P.3d 1027.

19. Under section 13-21-202, there is no requirement that the decedent had a viable claim on the date of death as a condition precedent to a wrongful death action. **Rowell v. Clifford**, 976 P.2d 363 (Colo. App. 1998).

### Source and Authority

This instruction is supported by the statutory provisions providing for wrongful death actions, §§ 13-21-201 to -204, C.R.S. See also §§ 8-2-201 to -204, C.R.S.



## 10:4 WRONGFUL DEATH OF CHILD— DETERMINING PECUNIARY LOSS

The net economic loss, if any, incurred by the plaintiff(s) as the parent(s) of (*name of child*) would be the reasonable value of any services (*name of child*) would have provided and earnings (he) (she) might have made while a minor together with any support (he) (she) might reasonably have been expected to provide the plaintiff(s) after (he) (she) became an adult, less the expenses the plaintiff(s) might reasonably have incurred in maintaining (*name of child*) and providing (him) (her) an education.

In determining the net economic loss, if any, you should consider (*name of child*)'s as well as the plaintiff('s)(s') ages, health, conditions of life, probable duration of their lives and their abilities to earn money. You should also consider (*name of child*)'s work habits and (his) (her) likelihood to aid and assist the plaintiff(s), taking into account not only the legal relationship between (*name of child*) and the plaintiff(s) but also the actual relationship between them as shown by acts of service or financial assistance, if any, provided by (*name of child*) to the plaintiff(s).

### Notes on Use

1. This instruction should be given only in conjunction with Instruction 10:3 and when so given, the last paragraph of Instruction 10:3 should be omitted.

2. When the parents of a minor child have allowed the child to retain his or her earnings, the refusal to instruct the jury that the earnings of a minor child belong to the child's father has been held not to be error. **Harman v. Chase**, 160 Colo. 449, 417 P.2d 784 (1966).

3. The Notes on Use to Instruction 10:3 are also applicable to this instruction.

4. For cases discussing net pecuniary benefit, see **Kogul v. Sonheim**, 150 Colo. 316, 372 P.2d 731 (1962) (in a suit for death of child, parents limited to net pecuniary loss and parental grief is not an element of damages); **Herbertson v. Russell**, 150 Colo. 110, 371 P.2d 422 (1962) (same); and **Rigot v. Conda**, 134 Colo. 375, 304 P.2d 629 (1956)

(directed verdict proper where insufficient evidence of pecuniary loss). *See also Morrison v. Bradley*, 655 P.2d 385 (Colo. 1982) (evidence of pecuniary loss sufficient to support amount of damages awarded by jury).

5. A decedent's future tax liability must not be considered when calculating a plaintiff's net pecuniary loss in a wrongful death case. **Hoyal v. Pioneer Sand Co.**, 188 P.3d 716 (Colo. 2008).

6. As to the factors the jury may consider in assessing damages, see **Pierce v. Conners**, 20 Colo. 178, 37 P. 721 (1894); and **Murphy v. Colo. Aviation, Inc.**, 41 Colo. App. 237, 588 P.2d 877 (1978). *See also Ford v. Bd. of Cty. Comm'rs*, 677 P.2d 358 (Colo. App. 1983) (in suit by minor child for wrongful death of father, evidence that father might have remarried, thus reducing amount of pecuniary support child might receive, was irrelevant).

7. For a discussion of the situation where a deceased child leaves no surviving spouse or child, see **Public Service Co. of Colorado v. District Court**, 674 P.2d 383 (Colo. 1984).

#### Source and Authority

This instruction is supported by **Kogul**, 150 Colo. at 319, 372 P.2d at 732 (supports first paragraph of instruction); **Herbertson**, 150 Colo. at 116-17, 371 P.2d at 426 (first and second paragraphs); **Stevens v. Strauss**, 147 Colo. 547, 364 P.2d 382 (1961) (second paragraph); **McEntyre v. Jones**, 128 Colo. 461, 263 P.2d 313 (1953) (first and second paragraphs); and **Lehrer v. Lorenzen**, 124 Colo. 17, 233 P.2d 382 (1951) (first and second paragraphs). *See also Millican v. Wolfe*, 701 P.2d 107 (Colo. App. 1985).

## **CHAPTER 11. MOTOR VEHICLES AND HIGHWAY TRAFFIC**

### **A. DUTY OF CARE**

- 11:1 Duty to Maintain Lookout
- 11:2 Duty of Care of Driver Having Right of Way
- 11:3 Duty of Care of Pedestrian or Bicycle Operator Having  
Right of Way
- 11:4 Pedestrian in Crosswalk
- 11:5 Duty of Care of Minor Operating Motor Vehicle
- 11:6 Duty of Care of Physically or Mentally Handicapped Driver
- 11:7 Duty of Care of Unlicensed Driver
- 11:8 Duty of Care as to Speed of Vehicle
- 11:9 Right to Assume Others Will Obey the Law
- 11:10 Driving on Wrong Side of Road as Negligence
- 11:11 Right to Assume That Driver on Wrong Side of Road Will  
Return
- 11:12 Rear-End Collision—Presumption of Negligence
- 11:13 Brake or Other Equipment Failure
- 11:14 Driving Under the Influence—Defined

### **B. RESERVED FOR FUTURE USE**

### **C. VICARIOUS LIABILITY—MOTOR VEHICLES**

- 11:15 Family Car Doctrine
- 11:16 Head of Household—Defined
- 11:17 Household or Family—Defined
- 11:18 Imputation of Driver's Negligence to Owner or Co-owner—  
Presumption of Control



## A. DUTY OF CARE

### 11:1 DUTY TO MAINTAIN LOOKOUT

**A driver must maintain a proper lookout to see what that driver could and should have seen in the exercise of reasonable care.**

#### Notes on Use

1. When this instruction is given, Instruction 9:8, defining “reasonable care,” should also be given.
2. The giving of this instruction does not preclude giving Instruction 9:13. **Horton v. Mondragon**, 705 P.2d 977 (Colo. App. 1984).

#### Source and Authority

This instruction is supported by **Clibon v. Wayman**, 137 Colo. 495, 327 P.2d 283 (1958); **Union Pacific Railroad v. Cogburn**, 136 Colo. 184, 315 P.2d 209 (1957); **Ridenour v. Diffie**, 133 Colo. 467, 297 P.2d 280 (1956); **Werner v. Schrader**, 127 Colo. 523, 258 P.2d 766 (1953); and **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993). *See also* RESTATEMENT (SECOND) OF TORTS § 289 cmts. d, e (1965); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 182 (5th ed. 1984).

## 11:2 DUTY OF CARE OF DRIVER HAVING RIGHT OF WAY

Although a driver may have the right of way, the driver must exercise reasonable care considering the existing conditions.

### Notes on Use

When this instruction is given, Instruction 9:8, defining "reasonable care," should also be given.

### Source and Authority

1. This instruction is supported by **Hansen v. Dillon**, 156 Colo. 396, 400 P.2d 201 (1965); **Bennett v. Hall**, 132 Colo. 419, 290 P.2d 241 (1955); **Denver Equipment Co. v. Newell**, 115 Colo. 23, 169 P.2d 174 (1946); **Stocker v. Newcomb**, 91 Colo. 479, 15 P.2d 975 (1932); **Parker v. Ullom**, 84 Colo. 433, 271 P. 187 (1928); and **Kepley v. Kim**, 843 P.2d 133 (Colo. App. 1992).

2. The statutory provisions governing the rights of way between or among vehicles are sections 42-4-701 to -713, C.R.S.

### 11:3 DUTY OF CARE OF PEDESTRIAN OR BICYCLE OPERATOR HAVING RIGHT OF WAY

Although a (pedestrian) (bicycle operator) may have the right of way, the (pedestrian) (bicycle operator) must exercise reasonable care considering the existing conditions.

#### Notes on Use

1. Use whichever parenthesized words or phrases are appropriate.
2. When this instruction is given, Instruction 9:8, defining “reasonable care,” should also be given.

#### Source and Authority

1. This instruction is supported by implication by the cases cited in the Source and Authority to Instruction 11:2.
2. It is also supported by the statutes governing the conduct of pedestrians, §§ 42-4-801 to -803; § 42-4-805, C.R.S., and bicyclists, § 42-4-1412, C.R.S.
3. “[A] pedestrian is ‘a person who travels on foot’ or ‘one walking as distinguished from one traveling by car or cycle.’” **Francen v. Colo. Dep’t of Revenue**, 2012 COA 110, ¶ 79 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1664 (2002)), *aff’d*, 2014 CO 54, 328 P.3d 111.



**11:4 PEDESTRIAN IN CROSSWALK**

**A pedestrian who is properly in a crosswalk has the right of way over vehicular traffic.**

**Notes on Use**

This instruction should be appropriately modified if there is evidence that the pedestrian was not in a crosswalk. A pedestrian who is not properly in a crosswalk is not necessarily negligent, however, such failure must also have been a cause of the pedestrian's injuries. **Radetsky v. Leonard**, 145 Colo. 358, 358 P.2d 1014 (1961); *cf.* **May v. Petersen**, 2020 COA 75, 465 P.3d 589 (where vehicle already in and blocking crosswalk when wheelchair-bound pedestrian entered crosswalk, pedestrian did not have right of way; ramp leading to crosswalk is not a part of the crosswalk).

**Source and Authority**

This instruction is supported by the statutory provisions governing the rights of way between pedestrians and motor vehicles, including sections 42-4-801 to -803 and 42-4-805 to -808, C.R.S. *See also* **Ridenour v. Diffie**, 133 Colo. 467, 297 P.2d 280 (1956).

## 11:5 DUTY OF CARE OF MINOR OPERATING MOTOR VEHICLE

**A minor driver has the same duty of care as an adult driver.**

### Notes on Use

1. This instruction should be used in cases where a minor is alleged to have operated a motor vehicle negligently. For the appropriate instruction when a child has allegedly acted negligently while engaged in other activities, see Instruction 9:9.

2. This instruction does not apply to a child under the age of seven. *See* Instruction 9:9.

3. This instruction applies whether the minor is licensed or unlicensed. *See* Instruction 11:7.

### Source and Authority

This instruction is supported by **Doran v. Jensen**, 504 P.2d 354 (Colo. App. 1972) (not published pursuant to C.A.R. 35(f)) (approving instruction as correct statement of Colorado law). *See also* RESTATEMENT (SECOND) OF TORTS § 283A cmt. c (1965); 1 D. DOBBS, THE LAW OF TORTS § 127 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 181 (5th ed. 1984).

## 11:6 DUTY OF CARE OF PHYSICALLY OR MENTALLY HANDICAPPED DRIVER

**A (mentally) (physically) handicapped driver has the same duty of care as a driver who is not handicapped.**

### Notes on Use

1. This instruction should be used whenever the negligence of a handicapped automobile operator is in issue.

2. While a handicap does not change a person's duty to exercise reasonable care, it is one of the "same or similar circumstances" as those terms are used in Instructions 9:6 (defining negligence) and 9:8 (defining reasonable care) that the jury should consider in determining whether a handicapped person was negligent. *See* RESTATEMENT (SECOND) OF TORTS §§ 283B & 283C (1965); 1 D. DOBBS, THE LAW OF TORTS §§ 119-121 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 175-79 (5th ed. 1984).

### Source and Authority

This instruction is supported by **Johnson v. Lambotte**, 147 Colo. 203, 363 P.2d 165 (1961), and the authorities cited in the above Notes on Use. *See also* **Renell v. Argonaut Liquor Co.**, 148 Colo. 154, 365 P.2d 239 (1961).



**11:7 DUTY OF CARE OF UNLICENSED DRIVER**

**An unlicensed driver has the same duty of care as a licensed driver.**

**Notes on Use**

This instruction should generally be given if evidence has been received of a driver's lack of a valid license.

**Source and Authority**

This instruction is supported by R.P. Davis, Annotation, *Lack of Proper Automobile Registration or Operator's License as Evidence of Operator's Negligence*, 29 A.L.R.2d 963 (1953).

## 11:8 DUTY OF CARE AS TO SPEED OF VEHICLE

The operator of a vehicle has a duty at all times to drive at a speed no greater than is reasonable under the conditions then existing.

### Notes on Use

This instruction is applicable even though the party charged with negligence was operating his or her vehicle within the speed limit prescribed by statute or ordinance. *See, e.g.*, § 42-4-1101(1), C.R.S.

### Source and Authority

In addition to section 42-4-1101(1), this instruction is supported by **Bennett v. Hall**, 132 Colo. 419, 290 P.2d 241 (1955); **Lambrecht v. Archibald**, 119 Colo. 356, 203 P.2d 897 (1949); and **Martin v. Minnard**, 862 P.2d 1014 (Colo. App. 1993).

## 11:9 RIGHT TO ASSUME OTHERS WILL OBEY THE LAW

**A person has the right to believe that others will obey applicable laws and regulations, unless there are reasonable grounds to believe otherwise.**

### Notes on Use

1. This instruction is primarily for use in a case where one person, having violated a law or regulation, thereby causing another's injury, sets up an affirmative defense of contributory negligence on the theory that the other person should have anticipated the violation. *See* Source and Authority below.

2. The basic rule set out in this instruction is applicable even though the roadway involved in the case was under construction or being repaved, at least so long as such conditions did not prevent orderly travel under the normal rules of the road. **Kennedy-Fudge v. Fink**, 644 P.2d 91 (Colo. App. 1982).

### Source and Authority

This instruction is supported by **Prentiss v. Johnston**, 119 Colo. 370, 203 P.2d 733 (1949); and **Gallagher Transportation Co. v. Giggey**, 101 Colo. 116, 71 P.2d 1039 (1937). *See also* **Ridenour v. Diffe**, 133 Colo. 467, 297 P.2d 280 (1956); **Ankeny v. Talbot**, 126 Colo. 313, 250 P.2d 1019 (1952).



## 11:10 DRIVING ON WRONG SIDE OF ROAD AS NEGLIGENCE

(When vehicles collide, the law presumes [, and you must find,] that a driver who was on the wrong side of the road at the time of the collision was negligent.)

### Notes on Use

1. This instruction may be used as the second paragraph of Instruction 3:5, when applicable. The bracketed phrase, "and you must find," must be included if this instruction is being used as the second paragraph of Version 1 of Instruction 3:5, but omitted if this instruction is otherwise appropriately being used as the second paragraph of Version 2 of Instruction 3:5. See **Devenyns v. Hartig**, 983 P.2d 63 (Colo. App. 1998) (no error in not giving instruction where evidence was insufficient to raise presumption and plaintiff tendered wrong version of instruction). An instruction on this presumption should be given only if there is sufficient evidence for a reasonable jury to find by a preponderance of the evidence that the facts giving rise to the presumption are true. *Id.*

2. In general, the happening of an accident does not raise a presumption of negligence. See Instruction 9:12. However, when a driver driving on the wrong side of the road is involved in a collision, such a presumption is raised.

3. Driving on the wrong side of the road may also be negligence per se if, under the circumstances, it constituted a violation of statute or ordinance and there appears to have been no reasonable justification for the conduct. Compare **Ankeny v. Talbot**, 126 Colo. 313, 250 P.2d 1019 (1952), with **Orth v. Bauer**, 163 Colo. 136, 429 P.2d 279 (1967), and **Sanchez v. Staats**, 34 Colo. App. 243, 526 P.2d 672 (1974), *aff'd*, 189 Colo. 228, 539 P.2d 1233 (1975). In such cases, Instruction 9:14 or 9:15 may be applicable rather than this instruction.

### Source and Authority

1. This instruction is supported by **Drake v. Hodges**, 114 Colo. 10, 161 P.2d 338 (1945), and **Larson v. Long**, 74 Colo. 152, 219 P. 1066 (1923). See also **Dolan v. Mitchell**, 179 Colo. 359, 502 P.2d 72 (1972).

2. Statutes relating to driving on the correct side of the road include sections 42-4-1001 to -1003, 42-4-1005 to -1007, 42-4-1010, and 42-4-1013, C.R.S.

## 11:11 RIGHT TO ASSUME THAT DRIVER ON WRONG SIDE OF ROAD WILL RETURN

**A driver may assume that another driver approaching on the wrong side of the road will take action to avoid a collision, unless there are reasonable grounds to believe otherwise.**

### Notes on Use

This instruction is primarily for use in a case where the claim is made that the person who was on the right side of the road was contributorily negligent in not properly responding to the other person's being on the wrong side of the road. *See Ringsby Truck Lines, Inc. v. Bradfield*, 193 Colo. 151, 563 P.2d 939 (1977).

### Source and Authority

This instruction is supported by **Ringsby Truck Lines, Inc.**, 193 Colo. at 154, 563 P.2d at 942; and **Bird v. Richardson**, 140 Colo. 310, 344 P.2d 957 (1959) (citing earlier cases). *See also* cases cited in Source and Authority to Instruction 11:9.

## 11:12 REAR-END COLLISION—PRESUMPTION OF NEGLIGENCE

*Committee's Note:* Although approved in a 2015 Court of Appeals decision (see Note on Use 5), this instruction appears to be inconsistent with **Chapman v. Harner**, 2014 CO 78, 339 P.3d 519, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). In those cases, the Supreme Court held that a rebuttable presumption “shifts the burden of going forward to the party against whom it is raised.” **Krueger**, 250 P.3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, ¶ 25; **Krueger**, 205 P.3d at 1154, 1156. In neither scenario is the jury instructed about the presumption. See Instruction 3:5 and its Notes on Use.

However, these two cases address only: (a) the presumption of negligence arising from *res ipsa loquitur* (**Chapman**) and (b) the presumption of undue influence when a beneficiary of a will is in a fiduciary or confidential relationship with the testator (**Krueger**). The Supreme Court has not yet considered whether to apply these holdings beyond the specific presumptions at issue in those two cases.

**When a driver of a motor vehicle hits another vehicle in the rear, the law presumes [, and you must find,] that the driver was negligent.**

### Notes on Use

1. In general, the happening of an accident does not raise a presumption of negligence. See Instruction 9:12. In the case of a rear-end collision, however, a presumption of negligence is raised.

2. This instruction sets out a special application of the doctrine of *res ipsa loquitur*. As to whether or not, in a case governed by comparative negligence, the plaintiff must be “free from negligence” in order to avail him or herself of the doctrine, see the discussion in the Notes on Use 10 and 11 for Instruction 9:17.



3. When appropriate, Instruction 11:13 (brake or other equipment failure) should also be given with this instruction.

4. This instruction should not be given unless “both vehicles involved in the accident were located on the road or on the shoulder, were in relatively close proximity, and were facing the same direction.” **Bettner v. Boring**, 764 P.2d 829, 833 (Colo. 1988); *see also* **Davis v. Lira**, 817 P.2d 539 (Colo. App. 1991) (where plaintiff’s car struck the defendant’s truck, which had been abandoned in the middle of the highway, Instruction 11:12 was not applicable), *rev’d on other ground*, 832 P.2d 240 (Colo. 1992).

5. This instruction may be given where the plaintiff’s vehicle overtakes and collides with the defendant’s vehicle stopped ahead on the roadway, and regardless of whether defendant’s vehicle moved forward after collision. **Vititoe v. Rocky Mountain Pavement Maint., Inc.**, 2015 COA 82, ¶¶ 95-96, 412 P.3d 767.

### Source and Authority

1. This instruction is supported by **Iacino v. Brown**, 121 Colo. 450, 217 P.2d 266 (1950). *See also* **Dilts v. Baker**, 162 Colo. 568, 427 P.2d 882 (1967) (plaintiff entitled to directed verdict on issue of negligence); **Rhodig v. Cummings**, 160 Colo. 499, 418 P.2d 521 (1966) (same); **Moseley v. Lamirato**, 149 Colo. 440, 370 P.2d 450 (1962) (same); **McClintic v. Hesse**, 151 P.3d 611 (Colo. App. 2006), *rev’d on other grounds*, 176 P.3d 759 (Colo. 2008).

2. For a discussion as to the sufficiency of the evidence to rebut the presumption of negligence set forth in this instruction, *see* **Huntoon v. TCI Cablevision of Colo., Inc.**, 969 P.2d 681 (Colo. 1998).

3. A jury could properly find abrupt, unwarranted stopping by plaintiff to be contributory negligence. *See* **Gaulin v. Templin**, 162 Colo. 55, 424 P.2d 377 (1967).

**11:13 BRAKE OR OTHER EQUIPMENT FAILURE**

The (driver) (person in charge) (owner) of a vehicle is not negligent because of a sudden failure of the vehicle's equipment if that person could not have reasonably foreseen the sudden equipment failure and that person has done all that a reasonably careful person would have done.

**Notes on Use**

Use whichever parenthesized words are appropriate.

**Source and Authority**

This instruction is supported by **Bartlett v. Bryant**, 166 Colo. 113, 442 P.2d 425 (1968); **Daigle v. Prather**, 152 Colo. 115, 380 P.2d 670 (1963); and **Eddy v. McAninch**, 141 Colo. 223, 347 P.2d 499 (1959).

**11:14 DRIVING UNDER THE INFLUENCE—  
DEFINED****No instruction prepared.****Note**

When there is sufficient evidence that a person was driving while under the influence of intoxicating liquor or drugs, Instruction 9:14, with insertions based on the relevant provisions of sections 42-4-1301(1) and (2), C.R.S., should be used. Such definitional instructions as may be necessary, based on the language of the statute, should also be given.



# B. RESERVED FOR FUTURE USE

## C. VICARIOUS LIABILITY—MOTOR VEHICLES

### 11:15 FAMILY CAR DOCTRINE

For the defendant, (*name*), to be held liable under the Family Car Doctrine for the negligence of the driver, you must find:

1. The defendant was the head of the household;
2. The vehicle was used by a member of that household;
3. The defendant had control of the use of the vehicle; and
4. The vehicle was used with the express or implied permission of the defendant.

#### Notes on Use

1. If the defendant has control over the use of the vehicle although the defendant may not be the owner, the defendant may nonetheless be liable under the family car doctrine. **Ferguson v. Hurford**, 132 Colo. 507, 290 P.2d 229 (1955); **Boyd v. Close**, 82 Colo. 150, 257 P. 1079 (1927); **Hasegawa v. Day**, 684 P.2d 936 (Colo. App. 1983), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

2. The family car doctrine is not applicable against one who is not the head of the household even though the person may be a co-owner of the vehicle. **Lee v. Degler**, 169 Colo. 226, 454 P.2d 937 (1969); *see also* **Ross v. Douglas**, 470 P.2d 900 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)) (mother, though owner of car, not liable as head of household for negligence of son where husband and father was employed, lived at home and supported family).

3. There may be circumstances giving rise to liability where the driver was not a member of the defendant's household, but the vehicle was being used for a family purpose. *See Boyd*, 82 Colo. at 155, 257 P. at 1081.

#### Source and Authority

This instruction is supported by **Hutchins v. Haffner**, 63 Colo. 365, 167 P. 966 (1917), which adopted the family car doctrine substantially as set out in this instruction. Also in support are **Appelhans v. Kirkwood**, 148 Colo. 92, 365 P.2d 233 (1961) (citing and discussing

several earlier cases); **Vick v. Zumwalt**, 130 Colo. 148, 273 P.2d 1010 (1954); **Hasegawa**, 684 P.2d at 938 (father had sufficient control over use of the vehicle though vehicle owned by driver-member of the household); and **McCall v. Roper**, 32 Colo. App. 352, 511 P.2d 541 (1973). *See also* **Halsted v. Peterson**, 797 P.2d 801 (Colo. App. 1990) (neither parent liable under family car doctrine for damages caused by daughter in operation of vehicle when daughter was no longer member of parents' household), *rev'd on other grounds*, 829 P.2d 373 (Colo. 1992).



**11:16 HEAD OF HOUSEHOLD—DEFINED**

**A head of a household is a person who assumes or shares the primary responsibility for supervising the general affairs of the household. There may be more than one head of household.**

**Notes on Use**

Joint ownership of the vehicle by a wife with her husband does not by itself make the wife a head of the household for purposes of the family car doctrine. **Lee v. Degler**, 169 Colo. 226, 454 P.2d 937 (1969). *See also* **Ross v. Douglas**, 470 P.2d 900 (Colo. App. 1970) (not published pursuant to C.A.R. 35(f)) (wife and mother not the head of the household where the husband and father was employed, lived at home, and supported the family).

**Source and Authority**

This instruction is supported by Colorado Constitution, article II, section 29 (by implication); and **Greenwood v. Kier**, 125 Colo. 333, 243 P.2d 417 (1952) (citing and discussing earlier cases in which a person other than a father or husband has been held liable under the family car doctrine). *See also* **Ferguson v. Hurford**, 132 Colo. 507, 290 P.2d 229 (1955) (widow held liable).

**11:17 HOUSEHOLD OR FAMILY—DEFINED**

**A household consists of those persons who are living together as a family.**

**(A child may reside in more than one household under a shared parenting time arrangement.)**

**Notes on Use**

Where a person living in the household is not related by blood, marriage or adoption, but has been treated as a member of the family by being accorded the usual privileges as a family member, the policy behind the family car doctrine would appear to be applicable. See **Hutchins v. Haffner**, 63 Colo. 365, 167 P. 966 (1917).

**Source and Authority**

1. This instruction is supported by **Halsted v. Peterson**, 797 P.2d 801 (Colo. App. 1990) (a “household” consists of those who dwell under the same roof and comprise a family), *rev’d on other grounds*, 829 P.2d 373 (Colo. 1992). See also **Hasegawa v. Day**, 684 P.2d 936 (Colo. App. 1983), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

2. The second paragraph is supported by **Midwest Mutual Insurance Co. v. Titus**, 849 P.2d 908 (Colo. App. 1993).

**11:18 IMPUTATION OF DRIVER'S NEGLIGENCE  
TO OWNER OR CO-OWNER—  
PRESUMPTION OF CONTROL**

When the [owner] [co-owner] of a motor vehicle is riding [in] [on] it as a passenger, and the vehicle is being used for a purpose in common with the driver, the law presumes [, and you must find,] that the [owner] [co-owner] has a right to control the vehicle, and the [owner] [co-owner] and the driver are both responsible for any negligence of the driver.

**Notes on Use**

1. This instruction, when otherwise applicable, may be used as the second paragraph of Instruction 3:5.

2. Use whichever bracketed words are appropriate. In particular, the bracketed phrase "and you must find" must be included if this instruction is being used as the second paragraph of Version 1 of Instruction 3:5, but omitted if this instruction is otherwise appropriately being used as the second paragraph of Version 2 of Instruction 3:5.

3. The right to control does not necessarily mean the right and ability to control physically, but rather a right to direct or command. **Lasnetske v. Parres**, 148 Colo. 71, 365 P.2d 250 (1961), *overruled on other grounds by* **Watson v. Reg'l Transp. Dist.**, 762 P.2d 133 (Colo. 1988).

4. As between themselves, the negligence of one co-owner is not imputable to the other to bar or reduce the latter's claim against the former. **Price v. Sommermeyer**, 41 Colo. App. 147, 584 P.2d 1220 (1978), *aff'd*, 198 Colo. 548, 603 P.2d 135 (1979).

5. This instruction does not apply to an owner-passenger who is suing a defendant third party where the defendant is seeking to impute, as vicarious contributory negligence, the negligence of the driver to the plaintiff, as owner-passenger. In rejecting the imputed contributory negligence rule of earlier cases, the supreme court held, "an owner-passenger's recovery for injuries negligently inflicted by a third party should be limited only if the owner-passenger . . . is [personally] negligent and if that negligence is a proximate cause of [the owner-passenger's] injury." **Watson**, 762 P.2d at 139-40.

6. The presumption set out in this instruction, however, is still applicable in cases in which the owner (or co-owner) passenger is being sued vicariously as a defendant for the negligence of a driver on the the-



ory that the owner and driver were acting as joint venturers. For such cases, see Instruction 7:5, and the supreme court's discussion in **Watson**, 762 P.2d at 137 n.7.

### Source and Authority

This instruction is supported by **Lasnetske**, 148 Colo. at 76-78, 365 P.2d at 253-54; **Moore v. Skiles**, 130 Colo. 191, 274 P.2d 311 (1954), *overruled on other grounds by Watson*, 762 P.2d at 141; and **Hover v. Clamp**, 40 Colo. App. 410, 579 P.2d 1181 (1978), *overruled on other grounds by Watson*, 762 P.2d at 141. See also RESTATEMENT (SECOND) OF TORTS § 491 cmt. j (1965).

## **CHAPTER 12. PREMISES LIABILITY**

### **Introductory Note**

#### **A. PERSONS INJURED ON THE PREMISES**

- 12:1 Liability of Owner or Occupant to A Trespasser Injured on Premises—Elements of Liability
- 12:2 Liability of Owner or Occupant to a Licensee Injured on Premises—Elements of Liability
- 12:3 Liability of Owner or Occupant to an Invitee Injured on Premises—Elements of Liability
- 12:4 Liability of Owner or Occupant to Children Injured on Premises—Attractive Nuisance Doctrine—Elements of Liability
- 12:5 Attractive Nuisance Doctrine—Child Between 14 and 18—Presumption of Competency

#### **B. PERSONS INJURED OFF THE PREMISES**

- 12:6 Liability of Owner or Occupant to Persons Injured Off the Premises—Elements of Liability
- 12:7 Duty of Owner or Occupant to Persons Injured Off the Premises

#### **C. LESSOR'S DUTY OF CARE**

- 12:8 No Implied Warranty of Fitness
- 12:9 Lessor's Liability for Injury From Latent Defect
- 12:10 Lessor's Liability for Injury When Premises Leased for Public or Semi-Public Use and Were Defective at Time of Lease
- 12:11 Lessor's Liability as Affected by Lessor's Promise to Repair Premises
- 12:12 Liability of Lessor Who Commences Repair of Premises

#### **D. AMUSEMENT PARK DEVICES—SKI LIFTS—OPERATOR'S DUTY OF CARE**

- 12:13 Amusement Devices and Ski Lifts—Duty of Care Where User Lacks Freedom of Movement

#### **E. LATERAL AND SUBJACENT SUPPORT**

- 12:14 Landowner's Right to Lateral and Subjacent Support

#### **F. PUBLIC PLACES**

- 12:15 Colorado Governmental Immunity Act

12:16 Duty of Care by User of Public Way

12:17 Negligent Choice of Route

G. VIOLATION OF STATUTE OR ORDINANCE

12:18 Violation of Statute or Ordinance—Evidence of Failure to Exercise Reasonable Care



## Introductory Note

1. In **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004), the Colorado Supreme Court concluded that the premises liability statute, § 13-21-115, C.R.S., is the exclusive remedy for parties injured on the property of another. *See also Larrieu v. Best Buy Stores, L.P.*, 2013 CO 38, ¶ 4, 303 P.3d 558; **Sweeney v. United Artists Theatre Circuit, Inc.**, 119 P.3d 538 (Colo. App. 2005); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003); **Thornbury v. Allen**, 991 P.2d 335 (Colo. App. 1999). This is apparently the case regardless of whether the injured party was on public or private property. **Anderson v. Hyland Hills Park & Recreation Dist.**, 119 P.3d 533 (Colo. App. 2004).

2. The premises liability statute classifies those injured on the property of another as trespassers, licensees, or invitees. § 13-21-115(3). Under the statute, whether an injured party is a trespasser, licensee, or invitee must be determined by the trial court. The fact finder determines the ultimate issues of liability and damages. § 13-21-115(4).

3. Part A of this chapter contains instructions for claims by parties who were injured on the premises of another. Instructions 12:1, 12:2, and 12:3 apply to claims involving trespassers, licensees, and invitees, respectively. Instructions 12:4 and 12:5 apply to claims based on the attractive nuisance doctrine, which the statute expressly does not abrogate. § 13-21-115(2), C.R.S.

4. Part B of this chapter applies to claims by parties who were injured off the premises by activities or conditions on the premises of another. The premises liability statute does not apply to these kinds of claims because it applies only to injuries that occur on the premises. § 13-21-115(3). Accordingly, for off-premises injuries, the common-law rules still apply.

5. Part C contains instructions regarding the common-law duties of lessors with respect to persons injured on or off the premises. While these instructions are valid with respect to persons injured off the premises, because of the exclusive remedy provided by the premises liability statute, there is some question as to the applicability with respect to persons injured on the premises. *See generally Wilson v. Marchiondo*, 124 P.3d 837 (Colo. App. 2005) (in action against landlord, premises liability statute is plaintiff's only means of recovery).

6. Part D contained an instruction on the duty of care of

operators of ski lifts and amusement park rides. The instruction was deleted based on the holding in **Anderson**, 119 P.3d at 536.

7. Part E provides an instruction on a landowner's right to lateral and subjacent support from adjoining property. The premises liability statute has no effect on this instruction.

8. Part F concerns the liability of public entities for injuries on or off the premises. For injuries on the premises, the instructions in Part A are applicable and for injuries off the premises, the instructions in Part B are applicable. In all cases against a public entity, the issue of sovereign immunity is for the court to determine. § 24-10-108, C.R.S. If the court determines that sovereign immunity has been waived, then, pursuant to section 24-10-107, C.R.S., "liability of the public entity shall be determined in the same manner as if the public entity were a private person." See e.g., **Anderson**, 119 P.3d at 535. Therefore, the same instructions that would be applicable in a case against a private person are also applicable in a case against a public entity.

9. The premises liability statute abrogates the common-law doctrine of negligence per se. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008) (plaintiff may recover against landowner only under the statute and not on a negligence per se claim, but evidence of building code violation admissible as evidence of landowner's unreasonable failure to exercise reasonable care).

10. The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. Co. v. Martin**, 209 P.3d 185 (Colo. 2009); see also **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff's comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff'd on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P'ship**, 214 P.3d 466 (Colo. App. 2008) (same); **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (nonparty mother's fault properly considered in dog bite case under premises liability statute).

11. A defendant may waive the right to the application of the premises liability statute and the right for a judicial determination as to whether the plaintiff is an invitee, licensee, or trespasser by failing to raise the application of the premises liability statute before or during trial. **Blood v. Qwest Servs. Corp.**, 224 P.3d 301 (Colo. App. 2009), *aff'd on other grounds*, 252 P.3d 1071 (Colo. 2011).



**A. PERSONS INJURED ON THE PREMISES****12:1 LIABILITY OF OWNER OR OCCUPANT TO A  
TRESPASSER INJURED ON PREMISES—  
ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had *(injuries)* *(damages)* *(losses)*;
2. The defendant acted willfully or deliberately;  
and
3. The defendant's willful or deliberate conduct was a cause of the plaintiff's *(injuries)* *(damages)* *(losses)*.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, *(then your verdict must be for the plaintiff)* *(then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim])*.

If you find that *(this affirmative defense has)* *(any one or more of these affirmative defenses have)* been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that *(this affirmative defense has not)* *(none of these affirmative defenses have)* been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. This instruction must be used in any action involving premises

liability to persons on the premises to which section 13-21-115(3)(a), C.R.S. (quoted below in Source and Authority), is applicable, as determined by the court under section 13-21-115(4). In general, section 13-21-115 applies in “any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property . . . .” § 13-21-115(2); see **Larrieu v. Best Buy Stores, L.P.**, 2013 CO 38, ¶ 4, 303 P.3d 558, 559 (The relevant “analysis necessitates a fact-specific, case-by-case inquiry into whether: (a) the plaintiff’s alleged injury occurred while on the landowner’s real property; and (b) the alleged injury occurred by reason of the property’s condition or as a result of activities conducted or circumstances existing on the property.”); see also **Tancrede v. Freund**, 2017 COA 36, ¶ 15, 401 P.3d 132 (motor vehicle collision arose out of activities conducted on defendants’ private property, so premises liability statute governed); **Thornbury v. Allen**, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute and “not under any other theory of negligence, general, or otherwise”). Under section 13-21-115(1), a “landowner” includes “an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.” See **Pierson v. Black Canyon Aggregates, Inc.**, 48 P.3d 1215 (Colo. 2002) (operators of gravel pit that had contract with county to mine gravel on land leased by county from third party were “landowners” because a “landowner” under the premises liability statute is any person in possession of real property and such possession need not be exclusive); see also **Lucero v. Ulvestad**, 2015 COA 98, ¶¶ 23-28, 411 P.3d 949 (based on language in installment land contract, seller was not a “landowner”); **Jordan v. Panorama Orthopedics & Spine Ctr., PC**, 2015 CO 24, ¶¶ 35, 37, 346 P.3d 1035 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 25, 292 P.3d 1232 (road contractor ceased to be “landowner” over project when the city accepted the project as finished); see also **Andrade v. Johnson**, 2016 COA 147, ¶ 19, 409 P.3d 582 (homeowner is not landowner of public sidewalk adjacent to property); **Burbach v. Canwest Invs., LLC**, 224 P.3d 437 (Colo. App. 2009) (public sidewalk is not the property of adjacent landowners because they have no legally cognizable interest in the sidewalk or a personal right to the sidewalk that is distinguishable from any right held by the public generally); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003) (janitorial contractor of building owner was “landowner” for purposes of premises liability statute in connection with slip on building stairwell by employee of building lessee). For a discussion as to when a landlord is a “landowner” for purposes of the premises liability statute, see **Nordin v. Madden**, 148 P.3d 218 (Colo. App. 2006). See also **Land-Wells v. Rain Way Sprinkler & Landscape, LLC**, 187 P.3d 1152 (Colo. App. 2008).



2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. v. Martin**, 209 P.3d 185 (Colo. 2009); *see also Reid v. Berkowitz*, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff's comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff'd on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P'ship**, 214 P.3d 466 (Colo. App. 2008) (same); **Paris ex rel. Paris v. Dance**, 194 P.3d 404 (Colo. App. 2008) (nonparty mother's fault properly considered in dog bite case under premises liability statute).

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are appropriate, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Because liability under this instruction depends on what amounts to intentional conduct, contributory negligence on the plaintiff's part would appear not to be a defense. *See Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979).

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. For the appropriate instructions relating to causation, *see* Instructions 9:18 to 9:21.

8. No further definition of the statutory words "willfully" and "deliberately" has been prepared, the words alone being sufficient to convey their meaning.

9. In certain cases, if evidence is sufficient, the plaintiff may be



entitled to have the case submitted to the jury on the alternative or additional theory of attractive nuisance. *See* Instructions 12:4 & 12:5.

10. Because under section 13-21-115(4), it is for the court and not for the jury to determine whether the person injured on the premises was a trespasser, a licensee, or an invitee, as defined in section 13-21-115(5) (quoted below in Source and Authority), it is not necessary to use the word “trespasser” in this instruction nor to provide the jury with its statutory definition.

11. The premises liability statute only applies if the injury occurs on the real property of another. § 13-21-115(2); **Trailside Townhome Ass’n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (where ownership of common areas in townhouse complex was vested in individual owners as tenants in common, premises liability statute was not applicable to injuries sustained by townhouse owner when she dove into pool in common area of townhouse property); *see also* **Jordan**, 2015 CO 24, ¶¶ 35, 37 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard**, 2012 COA 208, ¶ 25 (road contractor ceased to be “landowner” over project when the city reassumed responsibility for the conditions and physical control over the site); **deBoer v. Jones**, 996 P.2d 754 (Colo. App. 2000) (landowners had no liability under premises liability statute to person injured as a result of a water meter pit located on landowners’ property where water district owned meter and was obligated to maintain it).

12. The premises liability statute, § 13-21-115, rather than the common-law “no duty” rule applied to spectator’s claim for personal injuries sustained when he was struck by a puck at a roller hockey game. **Teneyck v. Roller Hockey Colo., Ltd.**, 10 P.3d 707 (Colo. App. 2000).

13. The common-law “open and obvious danger” doctrine, which provides that landowners are not liable for injuries caused by open and obvious dangers on their property, does not apply in actions governed by the premises liability statute, § 13-21-115. **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004). *See also* **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008) (premises liability statute abrogates common-law doctrine of negligence per se).

### Source and Authority

1. This instruction is supported by section 13-21-115, in particular, section 13-21-115(3)(a), which provides:

A trespasser may recover only for damages willfully or deliberately caused by the landowner.

Section 13-21-115(4), provides:

In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

Section 13-21-115(5), provides:

As used in this section:

- (a) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.
- (b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.
- (c) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

2. For cases discussing the distinction between invitees, licensees, and trespassers, see **Rucker v. Federal National Mortgage Ass'n**, 2016 COA 114, ¶ 36, 410 P.3d 675; **Corder v. Folds**, 2012 COA 174, ¶¶ 9-18, 292 P.3d 1177; and **Vigil v. Franklin**, 81 P.3d 1084 (Colo. App. 2003), *rev'd on other grounds*, 103 P.3d 322 (Colo. 2004). See also **Warembourg v. Excel Elec., Inc.**, 2020 COA 103, ¶ 50, 471 P.3d 1213 (floor installer was invitee, not trespasser, because he had authority to troubleshoot electrical box and electrician did not limit his authority); **Tancrede**, 2017 COA 36, ¶ 15 (holding motor vehicle passenger was a trespasser on private property and had to allege willful and deliberate conduct).

3. A "licensee" or "invitee" may become a "trespasser" by exceeding the scope of the landowner's consent. **Chapman v. Willey**, 134 P.3d 568 (Colo. App. 2006).

4. For a statutory limitation on the liability of landowners who, without charge, invite or allow others to use their property for recreational purposes, see sections 33-41-101 to -106, C.R.S.

5. For a discussion of the interplay between section 13-21-115, and the Workers' Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S., see **Barron v. Kerr-McGee Rocky Mtn. Corp.**, 181 P.3d 348 (Colo. App. 2007). See also **Cavaleri v. Anderson**, 2012 COA 122, ¶¶ 4-17, 298 P.3d 237.



## 12:2 LIABILITY OF OWNER OR OCCUPANT TO A LICENSEE INJURED ON PREMISES— ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant (either)

(a) (failed to use reasonable care with respect to a danger on the property which (1) [he] [she] created and (2) [he] [she] actually knew about before the plaintiff incurred any [injuries] [damages] [losses],)

or

(b) (failed to use reasonable care to warn of a danger on the property (1) which [he] [she] did not create, (2) but which [he] [she] actually knew about, and (3) the danger was one not ordinarily present on property of the type involved in this case); and

3. The defendant's failure was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any

one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. This instruction must be used in any action involving premises liability to persons on the premises to which section 13-21-115(3)(a), C.R.S. (quoted below in Source and Authority), is applicable, as determined by the court under section 13-21-115(4). In general, section 13-21-115 applies in “any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property . . . .” § 13-21-115(2); see **Larrieu v. Best Buy Stores, L.P.**, 2013 CO 38, ¶ 4, 303 P.3d 558, 559 (The relevant “analysis necessitates a fact-specific, case-by-case inquiry into whether: (a) the plaintiff’s alleged injury occurred while on the landowner’s real property; and (b) the alleged injury occurred by reason of the property’s condition or as a result of activities conducted or circumstances existing on the property.”); see also **Tancrede v. Freund**, 2017 COA 36, ¶ 15, 401 P.3d 132 (motor vehicle collision arose out of activities conducted on defendants’ private property, so premises liability statute governed); **Thornbury v. Allen**, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute and “not under any other theory of negligence, general, or otherwise”). Under section 13-21-115(1), a “landowner” includes “an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.” See **Pierson v. Black Canyon Aggregates, Inc.**, 48 P.3d 1215 (Colo. 2002) (operators of gravel pit that had contract with county to mine gravel on land leased by county from third party were “landowners” because a “landowner” under the premises liability statute is any person in possession of real property and such possession need not be exclusive); see also **Lucero v. Ulvestad**, 2015 COA 98, ¶¶ 23-28, 411 P.3d 949 (based on language in installment land contract, seller was not a “landowner”); **Jordan v. Panorama Orthopedics & Spine Ctr., PC**, 2015 CO 24, ¶¶ 35, 37, 346 P.3d 1035 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 25, 292 P.3d 1232 (road contractor ceased to be “landowner” over project when the city accepted



the project as finished); *see also* **Andrade v. Johnson**, 2016 COA 147, ¶ 19, 409 P.3d 582 (homeowner is not landowner of public sidewalk adjacent to property); **Burbach v. Canwest Invs., LLC**, 224 P.3d 437 (Colo. App. 2009) (public sidewalk is not the property of adjacent landowners because they have no legally cognizable interest in the sidewalk or a personal right to the sidewalk that is distinguishable from any right held by the public generally); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003) (janitorial contractor of building owner was “landowner” for purposes of premises liability statute in connection with slip on building stairwell by employee of building lessee). For a discussion as to when a landlord is a “landowner” for purposes of the premises liability statute, *see* **Nordin v. Madden**, 148 P.3d 218 (Colo. App. 2006). *See also* **Land-Wells v. Rain Way Sprinkler & Landscape, LLC**, 187 P.3d 1152 (Colo. App. 2008).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, *see* the Notes on Use to Instruction 4:20 (model unified verdict form). The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. v. Martin**, 209 P.3d 185 (Colo. 2009); *see also* **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff’s comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff’d on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P’ship**, 214 P.3d 466 (Colo. App. 2008) (same).

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are appropriate, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. For the appropriate instructions relating to causation, *see* Instruc-



tions 9:18 to 9:21, and for the definition of “reasonable care,” see Instruction 9:8.

7. Because under section 13-21-115(4), it is for the court and not the jury to determine whether the person injured on the premises was a trespasser, licensee, or invitee, as defined in section 13-21-115(5) (quoted in Source and Authority), it is not necessary to use the word “licensee” in this instruction nor provide the jury with its statutory definition.

8. Because section 13-21-115(3.5), provides “that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover,” this instruction must be appropriately modified to include any applicable additional alternative of which there is sufficient evidence.

9. The premises liability statute applies only if the injury occurs on the real property of another. § 13-21-115(2); **Trailside Townhome Ass’n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (where ownership of common areas in townhouse complex was vested in individual owners as tenants in common, premises liability statute was not applicable to injuries sustained by townhouse owner when she dove into pool in common area of townhouse property); *see also* **Jordan**, 2015 CO 24, ¶¶ 35, 37 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard**, 2012 COA 208, ¶ 25 (road contractor ceased to be “landowner” over project when the city reassumed responsibility for the conditions and physical control over the site); **deBoer v. Jones**, 996 P.2d 754 (Colo. App. 2000) (landowners had no liability under premises liability statute to person injured as a result of water meter pit located on landowners’ property where water district owned meter and was obligated to maintain it).

10. In certain cases if the evidence is sufficient, the plaintiff may be entitled to have the case submitted to the jury on the alternative or additional theory of attractive nuisance. *See* Instructions 12:4 & 12:5.

11. The common-law “open and obvious danger” doctrine, which provides that landowners are not liable for injuries caused by open and obvious dangers on their property, does not apply in actions governed by the premises liability statute, § 13-21-115. **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004). *See also* **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008) (premises liability statute abrogates common-law doctrine of negligence per se).

### Source and Authority

1. This instruction is supported by section 13-21-115, in particular, section 13-21-115(3)(b), which provides:

A licensee may recover only for damages caused:

- (I) By the landowner's unreasonable failure to exercise reasonable care with respect to dangers created by the landowner of which the landowner actually knew; or
- (II) By the landowner's unreasonable failure to warn of dangers not created by the landowner which are not ordinarily present on property of the type involved and of which the landowner actually knew.

Section 13-21-115(4), provides:

In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

Section 13-21-115(5) provides:

As used in this section:

- (a) "Invitee" means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the landowner's express or implied representation that the public is requested, expected, or intended to enter or remain.
- (b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.
- (c) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

2. For cases discussing licensees, see **Legro v. Robinson**, 2015 COA 183, ¶ 30, 369 P.3d 785 (bike racer on federal land is a licensee where landowner held grazing permit and consented to entry by people

who had the Forest Service's consent); **Reid v. Berkowitz**, 2013 COA 110M, ¶¶ 9-17, 315 P.3d 185 (a friend of a subcontractor was a licensee on the general contractor's construction site because of: (1) the parties' ongoing business relationship, (2) the general contractor maintaining an "open worksite," and (3) the custom of friends helping subcontractors with their work on the construction site); and **Corder v. Folds**, 2012 COA 174, ¶¶ 9-19, 292 P.3d 1177 (term "consent" as used regarding a licensee in the Premises Liability Act includes implied consent). For a discussion of the standard of care that the premises liability act, § 13-21-115, imposes on a landowner with regard to a licensee, see **Wright v. Vail Run Resort Cmty. Ass'n**, 917 P.2d 364 (Colo. App. 1996).

3. For other cases discussing distinction between licensee and invitee under premises liability statute, see **Rieger v. Wat Buddhawararam of Denver, Inc.**, 2013 COA 156, ¶ 17-25, 338 P.3d 404 (volunteer working on property of landowner is a licensee); **Wycoff v. Seventh Day Adventist Ass'n of Colo.**, 251 P.3d 1258 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when she paid to stay on the premises, even if the payment was through an intermediary); **Wycoff v. Grace Community Church of the Assemblies of God**, 251 P.3d 1260 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when church sponsored event and encouraged youth attendees by securing access to land and lodging, providing meals, and affirmatively facilitating attendance and participation, such as by driving attendees to the site); **Lakeview Assocs., Ltd. v. Maes**, 907 P.2d 580 (Colo. 1995) (tenant of apartment building who slipped and fell in apartment parking lot was invitee, not a licensee); **Henderson**, 70 P.3d at 616 (employee of lessee of building was an invitee at building in which he worked); and **Grizzell v. Hartman Enters., Inc.**, 68 P.3d 551 (Colo. App. 2003) (child who was let into sandwich shop by employee after shop was closed for business to the general public was a licensee).

4. Where plaintiff was allegedly injured because of a dangerous condition on the premises of a landowner, the landowner could be held liable for the negligent hiring, supervision, or retention of a maintenance employee, who was allegedly responsible for the condition only if the plaintiff could establish that the landowner had violated the standard of care set forth in section 13-21-115(3). **Casey v. Christie Lodge Owners Ass'n**, 923 P.2d 365 (Colo. App. 1996); *see also* **Reid v. Berkowitz**, 2016 COA 28, ¶ 30, 370 P.3d 644 (landowner (general contractor) cannot be liable for default judgments on common law negligence claims against subcontractors); **Thornbury**, 991 P.2d at 340 (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute, § 13-21-115, and "not under any other theory of negligence, general, or otherwise").

5. The statutory duty of a landowner in possession of property to maintain the premises in a safe condition may not be delegated. *See* **Springer v. City and Cty. of Denver**, 13 P.3d 794, 804 (Colo. 2000) ("the General Assembly intended to retain the doctrine of nondelegation



of premises liability”); **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1997) (trial court erred in not instructing jury that negligence of independent contractor hired to maintain sidewalk in safe condition was imputable to department store owner if negligence of independent contractor created danger to invitees such as the plaintiff and store owner knew or should have known of the danger); and **Jules v. Embassy Props., Inc.**, 905 P.2d 13 (Colo. App. 1995) (owner of office building could not delegate statutory duty by transferring exclusive control of the maintenance of building to property manager).

6. For a discussion of the interplay between section 13-21-115 and the Workers’ Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S., see **Barron v. Kerr-McGee Rocky Mountain Corp.**, 181 P.3d 348 (Colo. App. 2007). See also **Cavaleri v. Anderson**, 2012 COA 122, ¶¶ 4-17, 298 P.3d 237.

7. For a discussion of the interplay between section 13-21-115, and the Volunteer Service Act, § 13-21-115.5, C.R.S., see **Rieger**, 2013 COA 156, ¶¶ 26-49.

**12:3 LIABILITY OF OWNER OR OCCUPANT TO AN  
INVITEE INJURED ON PREMISES—  
ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of premises liability, you must find all the following have been proved by a preponderance of the evidence:

1. The plaintiff had (injuries) (damages) (losses);
2. The defendant actually knew about a danger on the property (or, as a person using reasonable care, should have known about it);
3. The defendant failed to use reasonable care to protect against the danger on the property; and
4. The defendant's failure was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

### Notes on Use

1. This instruction must be used in any action involving premises liability to persons on the premises to which section 13-21-115(3)(c), C.R.S. (quoted below in Source and Authority), is applicable, as determined by the court under section 13-21-115(4). In general, section 13-21-115 applies in “any civil action brought against a landowner by a person who alleges injury occurring while on the real property of another and by reason of the condition of such property, or activities conducted or circumstances existing on such property . . . .” § 13-21-115(2); see **Larrieu v. Best Buy Stores, L.P.**, 2013 CO 38, ¶ 4, 303 P.3d 558, 559 (The relevant “analysis necessitates a fact-specific, case-by-case inquiry into whether: (a) the plaintiff’s alleged injury occurred while on the landowner’s real property; and (b) the alleged injury occurred by reason of the property’s condition or as a result of activities conducted or circumstances existing on the property.”); see also **Tancrede v. Freund**, 2017 COA 36, ¶ 15, 401 P.3d 132 (motor vehicle collision arose out of activities conducted on defendants’ private property, so premises liability statute governed); **Thornbury v. Allen**, 991 P.2d 335, 340 (Colo. App. 1999) (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute and “not under any other theory of negligence, general, or otherwise”). Under section 13-21-115(1), a “landowner” includes “an authorized agent or a person in possession of real property and a person legally responsible for the condition of real property or for the activities conducted or circumstances existing on real property.” See **Pierson v. Black Canyon Aggregates, Inc.**, 48 P.3d 1215 (Colo. 2002) (operators of gravel pit that had contract with county to mine gravel on land leased by county from third party were “landowners” because a “landowner” under the premises liability statute is any person in possession of real property and such possession need not be exclusive); see also **Lucero v. Ulvestad**, 2015 COA 98, ¶¶ 23-28, 411 P.3d 949 (based on language in installment land contract, seller was not a “landowner”); **Jordan v. Panorama Orthopedics & Spine Ctr., PC**, 2015 CO 24, ¶¶ 35, 37, 346 P.3d 1035 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard v. Vista Paving Corp.**, 2012 COA 208, ¶ 25, 292 P.3d 1232 (road contractor ceased to be “landowner” over project when the city accepted the project as finished); see also **Andrade v. Johnson**, 2016 COA 147, ¶ 19, 409 P.3d 582 (homeowner is not landowner of public sidewalk adjacent to property); **Burbach v. Canwest Invs., LLC**, 224 P.3d 437 (Colo. App. 2009) (public sidewalk is not the property of adjacent landowners because they have no legally cognizable interest in the sidewalk or a personal right to the sidewalk that is distinguishable from any right held by the public generally); **Henderson v. Master Klean Janitorial, Inc.**, 70 P.3d 612 (Colo. App. 2003) (janitorial contractor of building owner was “landowner” for purposes of premises liability statute in connection with slip on building stairwell by employee of building lessee). For a discussion as to when a landlord is a “landowner” for



purposes of the premises liability statute, see **Nordin v. Madden**, 148 P.3d 218 (Colo. App. 2006). See also **Land-Wells v. Rain Way Sprinkler & Landscape, LLC**, 187 P.3d 1152 (Colo. App. 2008).

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). The premises liability statute was amended effective April 5, 2006, to state that the defenses of assumption of risk, pro rata liability, and comparative negligence are available in premises liability actions. § 13-21-115(2). The Colorado Supreme Court has concluded that, even before the 2006 amendment, the premises liability statute did not preclude the defenses of comparative negligence or pro rata liability. **Union Pac. R.R. v. Martin**, 209 P.3d 185 (Colo. 2009); see also **Reid v. Berkowitz**, 2013 COA 110M, ¶ 67, 315 P.3d 185 (remanding premises liability case to determine plaintiff's comparative negligence); **Tucker v. Volunteers of Am. Colo. Branch**, 211 P.3d 708 (Colo. App. 2008) (both before and after the 2006 amendment, defenses of comparative negligence and assumption of risk could be asserted in premises liability claim), *aff'd on other grounds sub nom. Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080 (Colo. 2010); **DeWitt v. Tara Woods Ltd. P'ship**, 214 P.3d 466 (Colo. App. 2008) (same).

3. Omit any numbered paragraph the facts of which are not in dispute, and make such other changes as are necessary in such circumstances to make the instruction understandable.

4. Use whichever parenthesized words are appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Though mitigation of damages is an affirmative defense, see Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. For the appropriate instructions relating to causation, see Instructions 9:18 to 9:21, and for the definition of "reasonable care," see Instruction 9:8.

7. The parenthetical clause in numbered paragraph 2 must be given in all cases, except when the "landowner's real property is classified for property tax purposes as agricultural land or vacant land," in which circumstance, the parenthetical clause must be omitted. See § 13-21-115(3)(c)(II) (quoted in full in Source and Authority).

8. Because under section 13-21-115(4) it is for the court and not the

jury to determine whether the person injured on the premises was a trespasser, licensee, or invitee, as defined in section 13-21-115(5) (quoted below in Source and Authority), it is not necessary to use the word “invitee” in this instruction nor provide the jury with its statutory definition.

9. Because section 13-21-115(3.5), provides “that the circumstances under which a licensee may recover include all of the circumstances under which a trespasser could recover and that the circumstances under which an invitee may recover include all of the circumstances under which a trespasser or a licensee could recover,” this instruction must be appropriately modified to include any applicable additional alternative of which there is sufficient evidence.

10. The premises liability statute only applies if the injury occurs on the real property of another. § 13-21-115(2); **Trailside Townhome Ass’n v. Acierno**, 880 P.2d 1197 (Colo. 1994) (where ownership of common areas in townhouse complex was vested in individual owners as tenants in common, premises liability statute was not applicable to injuries sustained by townhouse owner when she dove into pool in common area of townhouse property); *see also* **Jordan**, 2015 CO 24, ¶¶ 35, 37 (tenant in multi-unit office building was not a “landowner” of the common-area sidewalk even though its patrons used the sidewalk and it alerted the landlord whenever the sidewalk needed repairs); **Collard**, 2012 COA 208, ¶ 25 (road contractor ceased to be “landowner” when the city reassumed responsibility for the conditions and physical control over the site); **deBoer v. Jones**, 996 P.2d 754 (Colo. App. 2000) (landowners had no liability under premises liability statute to person injured as a result of water meter pit located on landowners’ property where water district owned meter and was obligated to maintain it).

11. In certain cases if the evidence is sufficient, the plaintiff may be entitled to have the case submitted to the jury on the alternative or additional theory of attractive nuisance. *See* Instructions 12:4 & 12:5.

12. In drafting this instruction, the Committee concluded that there was no meaningful difference between a failure to exercise reasonable care and an unreasonable failure to exercise reasonable care. In **Lawson v. Safeway, Inc.**, 878 P.2d 127 (Colo. App. 1994), the defendant tendered instructions that included the exact language of the statute requiring the jury to determine whether there had been an unreasonable failure to exercise reasonable care. The trial court rejected the defendant’s tendered instructions and instructed the jury in accordance with this Instruction 12:3. On appeal, the court held that: “[a]ssuming, without deciding, that there is a meaningful difference between a failure to exercise reasonable care and an unreasonable failure to exercise reasonable care, we conclude that, under the circumstances presented here, any error in the court’s instruction to the jury did not result in ‘substantial prejudicial error.’” *Id.* at 130 (quoting **Armentrout v. FMC Corp.**, 842 P.2d 175, 186 (Colo. 1992)); *see also* **Lombard v.**

**Colo. Outdoor Educ. Ctr.**, 179 P.3d 16, 21 (Colo. App. 2007) (“The phrase ‘unreasonable failure to exercise reasonable care’ appears to be redundant in that the failure to exercise reasonable care is, almost by definition, unreasonable.”), *rev’d on other grounds*, 187 P.3d 565 (Colo. 2008).

13. The common-law “open and obvious danger” doctrine, which provides that landowners are not liable for injuries caused by open and obvious dangers on their property, does not apply in actions governed by the premises liability statute, § 13-21-115. **Vigil v. Franklin**, 103 P.3d 322 (Colo. 2004); *see also Lombard*, 187 P.3d at 574-75 (premises liability statute abrogates common-law doctrine of negligence per se).

### Source and Authority

1. This instruction is supported by section 13-21-115, in particular, section 13-21-115(3)(c), which provides:

- (I) Except as otherwise provided in subparagraph (II) of this paragraph (c), an invitee may recover for damages caused by the landowner’s unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew or should have known.
- (II) If the landowner’s real property is classified for property tax purposes as agricultural land or vacant land, an invitee may recover for damages caused by the landowner’s unreasonable failure to exercise reasonable care to protect against dangers of which he actually knew.

Section 13-21-115(4), provides:

In any action to which this section applies, the judge shall determine whether the plaintiff is a trespasser, a licensee, or an invitee, in accordance with the definitions set forth in subsection (5) of this section. If two or more landowners are parties defendant to the action, the judge shall determine the application of this section to each such landowner. The issues of liability and damages in any such action shall be determined by the jury or, if there is no jury, by the judge.

Section 13-21-115(5), provides:

As used in this section:

- (a) “Invitee” means a person who enters or remains on the land of another to transact business in which the parties are mutually interested or who enters or remains on such land in response to the land-



owner's express or implied representation that the public is requested, expected, or intended to enter or remain.

- (b) "Licensee" means a person who enters or remains on the land of another for the licensee's own convenience or to advance his own interests, pursuant to the landowner's permission or consent. "Licensee" includes a social guest.
- (c) "Trespasser" means a person who enters or remains on the land of another without the landowner's consent.

2. This instruction was held to be a correct statement of the law in **Lombard v. Colorado Outdoor Education Center, Inc.**, 266 P.3d 412 (Colo. App. 2011).

3. A tenant of an apartment building who slipped and fell in apartment parking lot was "invitee" on premises rather than "licensee" under premises liability statute. **Lakeview Assocs., Ltd. v. Maes**, 907 P.2d 580 (Colo. 1995). For other cases discussing the distinction between invitee, licensee, and trespasser under the premises liability statute, see **Warembourg v. Excel Elec., Inc.**, 2020 COA 103, ¶ 50, 471 P.3d 1213 (floor installer was invitee, not trespasser, because he had authority to troubleshoot electrical box and electrician did not limit his authority); **Rucker v. Federal National Mortgage Ass'n**, 2016 COA 114, ¶ 36, 410 P.3d 675 (plaintiff was a trespasser, not an invitee, because "For Sale" sign did not constitute an implied representation to the public to enter or remain on the property"); **Rieger v. Wat Buddhawaram of Denver, Inc.**, 2013 COA 156, ¶¶ 17-25, 338 P.3d 404 (volunteer working on property of landowner is a licensee, not an invitee); **Wycoff v. Seventh Day Adventist Ass'n of Colo.**, 251 P.3d 1258 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when she paid to stay on the premises, even if the payment was through an intermediary); **Wycoff v. Grace Community Church of the Assemblies of God**, 251 P.3d 1260 (Colo. App. 2010) (plaintiff was an invitee, not a licensee, when church sponsored event and encouraged youth attendees by securing access to land and lodging, providing meals, and affirmatively facilitating attendance and participation, such as by driving attendees to the site); **Henderson**, 70 P.3d at 616 (employee of lessee of building was an invitee at building in which he worked); and **Grizzell v. Hartman Enterprises, Inc.**, 68 P.3d 551 (Colo. App. 2003) (child who was let into sandwich shop by employee after shop was closed for business to the general public was a licensee under premises liability statute). See also **Pedge v. R.M. Holdings, Inc.**, 75 P.3d 1126 (Colo. App. 2002) (president and owner of corporate tenant of office complex was invitee of landlord and manager of office complex).

4. Where plaintiff was allegedly injured because of a dangerous

condition on the premises of a landowner, the landowner could be held liable for the negligent hiring, supervision, or retention of a maintenance employee, who was allegedly responsible for the condition only if the plaintiff could establish that the landowner had violated the standard of care set forth in section 13-21-115(3). **Casey v. Christie Lodge Owners Ass'n**, 923 P.2d 365 (Colo. App. 1996); *see also Reid v. Berkowitz*, 2016 COA 28, ¶ 30, 370 P.3d 644 (general contractor landowner cannot be liable for default judgments on common law negligence claims against subcontractors); **Thornbury**, 991 P.2d at 340 (housekeeper injured when glass shelf fell on her foot while supervising cleaning of condominium could recover against condominium owner only under premises liability statute, § 13-21-115, and “not under any other theory of negligence, general, or otherwise”).

5. The statutory duty of a landowner in possession of property to maintain the premises in a safe condition may not be delegated. *See Springer v. City and County of Denver*, 13 P.3d 794, 804 (Colo. 2000) (“the General Assembly intended to retain the doctrine of nondelegation of premises liability”); **Kidwell v. K-Mart Corp.**, 942 P.2d 1280 (Colo. App. 1997) (trial court erred in not instructing jury that negligence of independent contractor hired to maintain sidewalk in safe condition was imputable to department store owner if negligence of independent contractor created danger to invitees such as the plaintiff and store owner knew or should have known of the danger); and **Jules v. Embassy Props., Inc.**, 905 P.2d 13 (Colo. App. 1995) (owner of office building could not delegate statutory duty by transferring exclusive control of the maintenance of building to property manager).

6. For a discussion of the interplay between section 13-21-115, and the Workers’ Compensation Act, §§ 8-40-101 to 8-47-209, C.R.S., *see Barron v. Kerr-McGee Rocky Mountain Corp.*, 181 P.3d 348 (Colo. App. 2007). *See also Cavaleri v. Anderson*, 2012 COA 122, ¶¶ 4-17, 298 P.3d 237.

7. For a discussion of the interplay between section 13-21-115 and the Volunteer Service Act, § 13-21-115.5, C.R.S., *see Rieger*, 2013 COA 156, ¶¶ 26-49.

**12:4 LIABILITY OF OWNER OR OCCUPANT TO  
CHILDREN INJURED ON PREMISES—  
ATTRACTIVE NUISANCE DOCTRINE—  
ELEMENTS OF LIABILITY**

**For the plaintiff, (*name of child*), to recover from the defendant, (*name*), on (his) (her) claim of attractive nuisance, you must find all the following have been proved by a preponderance of the evidence:**

- 1. The plaintiff had (injuries) (damages) (losses);**
- 2. The plaintiff's (injuries) (damages) (losses) were caused (by an unusual activity on the premises) (or) (by an unusual condition, other than a natural condition, existing on the premises);**
- 3. The plaintiff was on the premises at the time (he) (she) was injured;**
- 4. The (activity) (or) (condition) was unusually attractive to children;**
- 5. The (activity) (or) (condition) created an unreasonable risk of injury to children which the defendant knew, or, as a reasonably careful person, should have known;**
- 6. The plaintiff was too young to appreciate or realize the risk of injury to (himself) (herself) from the (activity) (or) (condition); and**
- 7. The defendant failed to exercise reasonable care to protect persons like the plaintiff from injury.**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must**



**consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim].**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### **Notes on Use**

1. When supported by sufficient evidence, this instruction should be given as an alternative to, or in addition to, Instructions 12:1, 12:2, or 12:3.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraph the facts of which are not in dispute, and use whichever parenthesized and bracketed words and phrases are appropriate to the evidence in the case.

4. If the defendant has put no affirmative defense in issue or there is insufficient evidence to support a defense, the last two paragraphs should be omitted. If the affirmative defense of comparative negligence has been put in issue, the elements of this instruction should be incorporated into Instruction 9:22, as well as the applicable comparative negligence instructions, *see* Instructions 9:26 to 9:28D, with such further modifications being made in those instructions as are necessary.

5. If the plaintiff is 14 years of age or more, or that fact is in dispute, Instruction 12:5 must also be given with this instruction.

6. Though mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

7. Other appropriate instructions defining the terms used in this instruction must also be given with this instruction, in particular Instruc-

tion 9:8, defining "reasonable care," and appropriate instructions relating to causation. See Instructions 9:18 to 9:21.

8. The implication of section 13-21-115(2), C.R.S., is that the doctrine of attractive nuisance is not applicable to a child who is 18 or more years of age.

### Source and Authority

1. This instruction is supported by section 13-21-115(2), and **S.W. ex rel. Wacker v. Towers Boat Club, Inc.**, 2013 CO 72, ¶ 24, 315 P.3d 1257.

2. Though the doctrine of attractive nuisance usually relates to a condition on the premises, its logic extends to activities which meet the same criteria, such as "unusual," "attractive," "not natural," etc.

3. The doctrine is designed to protect children who are attracted to the conditions, premises, or object that caused their injuries, regardless whether the children are legally classified as invitees, licensees, or trespassers on the premises where the injury occurs. **S.W. ex rel. Wacker**, 2013 CO 72, ¶ 24.

4. The requirements for the attractive nuisance doctrine have been considered in several cases. See **S.W. ex rel. Wacker**, 2013 CO 72, ¶ 24 (doctrine may apply to eleven-year-old child who was lawfully on premises to attend a private party when he was injured on an inflatable bungee run); **Denver Tramway Corp. v. Garcia**, 154 Colo. 417, 390 P.2d 952 (1964) (doctrine not applicable to nine-year-old child because of inadequate evidence of defendant's negligence as well as the facts that the bus which caused the injury did not "invite" the trespass, it was not an unusual thing, and the child was aware of the risk involved); **Staley v. Sec. Athletic Ass'n**, 152 Colo. 19, 380 P.2d 53 (1963) (doctrine not applicable to four-year-old child because of inadequate evidence of defendant's negligence and because the swimming pool which caused the injury was not sufficiently unusual); **Niernberg v. Gavin**, 123 Colo. 1, 224 P.2d 215 (1950) (doctrine inapplicable to six-year-old child where defendant had acted reasonably in giving a warning of the danger); **Phipps v. Mitze**, 116 Colo. 288, 180 P.2d 233 (1947) (doctrine inapplicable to nine-year-old child who was aware of the risk and had been warned to avoid it); **Esquibel v. City & Cty. of Denver**, 112 Colo. 546, 151 P.2d 757 (1944) (doctrine inapplicable to eleven-year-old child because the junk auto body that caused the injury had not "invited" the trespass and was not sufficiently unusual, and plaintiff had also been warned and appreciated the risk); **Denver Tramway Corp. v. Callahan**, 112 Colo. 460, 150 P.2d 798 (1944) (doctrine inapplicable to eleven-year-old child because of inadequate evidence of negligence); **Dunbar v. Olivieri**, 97 Colo. 381, 50 P.2d 64 (1935) (doctrine inapplicable to nine-year-old child since rubbish fire which caused the injury was not sufficiently unusual); **Hayko v. Colo. & Utah Coal Co.**, 77

Colo. 143, 146, 235 P. 373, 374 (1925) (doctrine inapplicable to ten-year-old child because the dynamite caps which caused the injury did not "invite" the trespass and the shack which did invite the trespass was ordinary and not "an unusual thing, unusually, extraordinarily attractive").



## 12:5 ATTRACTIVE NUISANCE DOCTRINE—CHILD BETWEEN 14 AND 18—PRESUMPTION OF COMPETENCY

“Presumptions” are rules based on experience or public policy and are established in the law to assist the jury in ascertaining the truth.

In this case, if you find by a preponderance of the evidence that the plaintiff, *(name of child)*, was 14 years of age or more, then the law presumes and you must find, (he) (she) was capable of appreciating or realizing any risks of harm to (himself) (herself) from (the activities) (or) (the conditions existing) on the premises of the defendant, *(name)*.

### Notes on Use

1. This instruction should be used only in conjunction with Instruction 12:4. It should also be used only when there is sufficient evidence that the plaintiff was “at least fourteen years of age but . . . less than eighteen years of age . . . .” § 13-21-115(2), C.R.S. In addition, as explained in the Notes on Use to Instruction 3:5, this instruction has been prepared on the assumption that the statutory presumption created by section 13-21-115(2) is one that shifts only the burden of going forward with the evidence, and is also one that “disappears” from the case if there is sufficient evidence in the case rebutting the presumed facts. For that reason, this instruction should only be given if its basic facts are supported by sufficient evidence, and there is no or insufficient evidence rebutting the presumed facts.

2. Use whichever parenthesized words and phrases are appropriate to the evidence in the case.

### Source and Authority

This instruction is supported by section 13-21-115(2), and the authorities cited in the Source and Authority to Instruction 3:5. *See also* **SW ex rel. Wacker v. Towers Boat Club, Inc.**, 2013 CO 72, 315 P.3d 1257.

**B. PERSONS INJURED OFF THE PREMISES****12:6 LIABILITY OF OWNER OR OCCUPANT TO  
PERSONS INJURED OFF THE  
PREMISES—ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligence, you must find all the following numbered propositions have been proved:

1. At the time of the occurrence, the defendant (owned) (occupied) (controlled) (conducted activities on) the premises;

2. (A condition existed) (An activity was conducted) on the premises which created an unreasonable risk of (injury) (damage) (loss) to (persons such as the plaintiff) (the property of persons such as the plaintiff);

(3. [Either]

[a. This condition (was created by the defendant) (or) (was of a continuous nature or was reasonably foreseeable because of the defendant's operating methods)]

[or]

[b. This condition was one the defendant knew of, or reasonably should have known of, in sufficient time to have (removed it) (corrected it) (or) (adequately warned persons that the condition was there) so that injury could have been prevented, and [he] [she] failed to do so];)

4. The defendant was negligent because (he) (she) failed to use reasonable care (in the management or maintenance of [his] [her] premises) (with respect to the operation of [his] [her] business on the premises) (with respect to the conduct of [his] [her]

activities on the premises) (or) (to [remove] [correct] [or] [give adequate warning of] the condition);

5. The plaintiff had (injuries) (damages) (losses); and

6. The defendant's negligence was a cause of the plaintiff's (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved by a preponderance of the evidence, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Whenever this instruction is given, Instruction 12:7 must also be given. In addition, the appropriate instruction or instructions relating to causation, see Instructions 9:18 to 9:21, and instructions defining the terms used in this instruction, for example, Instruction 9:6, defining "negligence," must also be given.

2. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form).

3. Omit any numbered paragraphs, the facts of which are not in dispute.



4. Use whichever parenthesized or bracketed words and phrases are most appropriate, and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

5. Though mitigation of damages is an affirmative defense, see Instruction 5:2, only rarely, if ever, when established will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

6. If the affirmative defense of comparative negligence has been properly raised, the beginning unnumbered paragraph as well as the numbered paragraphs of this instruction should be substituted for the beginning unnumbered and numbered paragraphs in Instruction 9:22, and that instruction should then be used in accord with its Notes on Use. As to the possible comparative negligence of the plaintiff, the plaintiff's knowledge and appreciation of a danger on the premises may be relevant to the plaintiff's own negligence, but it is not negligence as a matter of law; neither does it relieve an owner or possessor of the land of the general duty to act or to have acted with reference to the danger as a reasonable person would have under the same or similar circumstances. **Brown v. Martin Marietta Corp.**, 690 P.2d 889 (Colo. App. 1984).

7. Parenthesized numbered paragraph 3 of this instruction must be omitted if the only evidence of defendant's negligence relates to the carrying on of an activity and not to the existence of a condition which would be covered by the rules set out in either subparagraph a or subparagraph b.

8. When the claimed negligence relates to the failure of the owner or occupant to have dealt adequately with an unreasonably dangerous condition, the plaintiff must prove that the owner or occupant (1) had actual knowledge of it, because he or she created it, or for some other reason; (2) had constructive notice of it (subparagraph b of parenthesized numbered paragraph 3); or (3) operated his or her business or carried on other activities in a way that such conditions were continuous or readily foreseeable (second parenthesized part of subparagraph a of parenthesized numbered paragraph 3).

9. When proof of constructive notice is required, it may be established by circumstantial evidence. **Bodeman v. Shutto Super Markets, Inc.**, 197 Colo. 393, 395, 593 P.2d 700, 701 (1979) ("The circumstances surrounding the injury, including the facts which demonstrate the existence of the dangerous condition itself, may give rise to a reasonable inference of constructive notice").

10. The rules stated in the Notes on Use to Instruction 9:21 are also applicable to this instruction.

### Source and Authority

1. This instruction is supported by **Mile High Fence Co. v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971), *superseded in part by statute*, § 13-21-115.

2. Bracketed subparagraph a of parenthesized numbered paragraph 3 is supported by **Safeway Stores, Inc. v. Smith**, 658 P.2d 255 (Colo. 1983).

3. Bracketed subparagraph b of parenthesized numbered paragraph 3 is supported by **CeBuzz, Inc. v. Sniderman**, 171 Colo. 246, 466 P.2d 457 (1970) (defendant held to have had sufficient notice of dangerous condition); **Adkins v. Denver Dry Goods Co.**, 167 Colo. 545, 448 P.2d 957 (1969) (insufficient evidence that the defendant knew or by the exercise of reasonable care should have known of the condition which caused the plaintiff's injuries); **Miller v. Crown Mart, Inc.**, 162 Colo. 281, 425 P.2d 690 (1967) (insufficient evidence that defendant by exercising reasonable care could have discovered popcorn on floor in time to prevent plaintiff's injuries); **King Soopers, Inc. v. Mitchell**, 140 Colo. 119, 342 P.2d 1006 (1959) (defendant had sufficient time by reasonably performing duty to inspect to discover accumulation of ice on parking lot and to eliminate it or warn plaintiff of it); **F.W. Woolworth Co. v. Peet**, 132 Colo. 11, 284 P.2d 659 (1955) (insufficient evidence that defendant by exercising reasonable care in performing duty to inspect could have discovered defect); and **Denver Dry Goods Co. v. Pender**, 128 Colo. 281, 262 P.2d 257 (1953) (no liability for slippery spot on floor unless defendant knew or should have known of it and reasonably could have prevented it or warned plaintiff of it).

4. The conditions which cause the plaintiff's injuries must have created an unreasonable risk of harm. **Montgomery Ward & Co. v. Kerns**, 172 Colo. 59, 470 P.2d 34 (1970); **Salazar v. City of Sheridan**, 44 Colo. App. 443, 618 P.2d 708 (1980).

5. Under certain circumstances, a lessor may be liable to persons off the premises for physical harm caused by dangerous conditions on the leased premises. See **Salazar v. Webb**, 44 Colo. App. 429, 618 P.2d 706 (1980).

## 12:7 DUTY OF OWNER OR OCCUPANT TO PERSONS INJURED OFF THE PREMISES

The (owner) (occupant) of premises has a duty to use reasonable care (to maintain the premises in a reasonably safe condition) (and) (to carry on any activities conducted on the premises in a reasonably safe manner) in view of the foreseeability, if any, of injury to others.

### Notes on Use

1. This instruction must be given with Instruction 12:6 whenever that instruction is given.
2. Use whichever parenthesized words are appropriate.
3. Whenever this instruction is given, Instruction 9:8, defining “reasonable care” must also be given.
4. The rules set out in the Notes on Use to Instruction 9:21 also apply to this instruction.

### Source and Authority

1. This instruction is supported by **Mile High Fence Co. v. Radovich**, 175 Colo. 537, 489 P.2d 308 (1971), *superseded in part by statute*, § 13-21-115.

2. The scope of a duty owed by a lessee of premises may depend on whether the lessee constructed, controlled, or maintained the portion of the premises that allegedly resulted in the dangerous condition. See **Woods v. Delgar Ltd.**, 226 P.3d 1178 (Colo. App. 2009) (lessee of property owes no duty of care to pedestrians to guard against the risk of snow naturally falling on an awning attached to the outside of the leased premises and melting, resulting in water dripping onto the sidewalk and freezing absent evidence that the lessee controlled, constructed, or maintained the awning).



**C. LESSOR'S DUTY OF CARE****12:8 NO IMPLIED WARRANTY OF FITNESS**

**Instruction deleted.**

**Note**

This instruction has been deleted in its entirety due to the enactment of Part 5 of the Tenants and Landlords Statute, which addresses tenant and landlord obligations for maintaining residential premises. See §§ 38-12-501 to -511, C.R.S. In particular, section 38-12-503, C.R.S. imposes a statutory warranty of habitability in every rental agreement.

**12:9 LESSOR'S LIABILITY FOR INJURY FROM  
LATENT DEFECT****No instruction provided.****Note**

The premises liability statute, § 13-21-115, C.R.S., does not expand or otherwise change the general common-law rule that, in the absence of certain recognized exceptions, a lessor who has transferred possession and control over leased premises to a lessee has no liability for injuries resulting from a dangerous condition of the premises. **Perez v. Grovert**, 962 P.2d 996 (Colo. App. 1998). In cases where such recognized exceptions may exist and an instruction dealing with this subject is required, Instructions 12:1, 12:2, and 12:3, appropriately modified, may be used.

## 12:10 LESSOR'S LIABILITY FOR INJURY WHEN PREMISES LEASED FOR PUBLIC OR SEMI-PUBLIC USE AND WERE DEFECTIVE AT TIME OF LEASE

A lessor is legally responsible for (injuries) (damages) (losses) caused by a condition of leased property if:

(1) The property is leased for (public) (semi-public) purposes; and

(2) At the time the property was leased, the lessor knew or reasonably should have known that the property was not reasonably safe for its intended purposes.

### Notes on Use

1. Under the provisions of section 13-21-115, C.R.S., this instruction may not be appropriate or may require modification. *See* Instructions 12:1, 12:2, and 12:3; *see also* **Jordan v. Panorama Orthopedics & Spine Center, PC**, 2015 CO 24, ¶ 37, 346 P.3d 1035, 1044 ("the fact that the public must pass through common areas to access a tenant's business does not necessarily mean that the tenant is conducting an activity in the common areas").

2. Use whichever parenthesized words are most appropriate.

3. Whenever this instruction is given, the appropriate instructions relating to causation (Instructions 9:18 to 9:21) must also be given.

### Source and Authority

This instruction is supported by **Gilligan v. Blakesley**, 93 Colo. 370, 26 P.2d 808 (1933) (lessor held liable for injuries to invitee of tenant for defect which amounted to a nuisance); **Colorado Mortgage & Investment Co. v. Giacomini**, 55 Colo. 540, 136 P. 1039 (1913) (lessor liable to guest of hotel for injuries caused by defective elevator which was unsafe at time of lease); RESTATEMENT (SECOND) OF TORTS § 359 (1965); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 437-40 (5th ed. 1984). *Cf.* **Volz v. Williams**, 112 Colo. 592, 152 P.2d 996 (1944) (lessor not liable where condition not dangerous but for lessee's subsequent negligence in not using protective devices provided).



**12:11 LESSOR'S LIABILITY AS AFFECTED BY  
LESSOR'S PROMISE TO REPAIR  
PREMISES**

A lessor is legally responsible for (injuries) (damages) (losses) caused by the lessor's failure to use reasonable care to perform an agreement to make specific repairs or to keep the premises in repair when:

- (1) A state of disrepair creates an unreasonable risk of injury to persons upon the premises; and
- (2) The (injuries) (damages) (losses) would have been prevented if the lessor had made the agreed repairs.

**Notes on Use**

1. Under the provisions of section 13-21-115, C.R.S., this instruction may not be appropriate or may require modification. *See* Instructions 12:1, 12:2, and 12:3; *see also* **Jordan v. Panorama Orthopedics & Spine Center, PC**, 2015 CO 24, ¶ 37, 346 P.3d 1035.
2. Use whichever parenthesized words are appropriate.
3. This instruction is applicable when the lessor's promise would be otherwise enforceable in a contract action. When such is not the case, the lessor may still be liable under the rule set out in Instruction 12:12.
4. When this instruction is given, Instruction 9:8 defining "reasonable care" should also be given, as well as the appropriate instructions relating to causation (Instructions 9:26 to 9:30).

**Source and Authority**

1. This instruction is supported by **Davis v. Marr**, 160 Colo. 27, 413 P.2d 707 (1966) (applying RESTATEMENT (SECOND) OF TORTS § 357 (1965)). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 443-45 (5th ed. 1984).
2. As to when a lessor may be liable for work undertaken by an independent contractor, *see* **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

## 12:12 LIABILITY OF LESSOR WHO COMMENCES REPAIR OF PREMISES

Whether or not a lessor has agreed to repair or maintain leased premises, if the lessor commences or attempts to (repair) (maintain) the premises, the lessor is under a duty to use reasonable care as to such (repairs) (maintenance) and proceed diligently, and if the lessor fails to do so, the lessor is negligent.

### Notes on Use

1. Under the provisions of section 13-21-115, C.R.S., this instruction may not be appropriate or may require modification. *See* Instructions 12:1, 12:2, and 12:3; *see also* **Jordan v. Panorama Orthopedics & Spine Center, PC**, 2015 CO 24, ¶ 37, 346 P.3d 1035.

2. Use whichever parenthesized words are appropriate.

3. Whenever this instruction is given, Instruction 9:8 defining "reasonable care" should also be given.

### Source and Authority

1. This instruction is supported by RESTATEMENT (SECOND) OF TORTS § 362 (1965); and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 63, at 445-46 (5th ed. 1984). As to the general obligation to use reasonable care in performing a duty voluntarily assumed, see the Source and Authority to Instruction 9:10, and **Lester v. Marshall**, 143 Colo. 189, 352 P.2d 786 (1960).

2. As to when a lessor may be liable for work undertaken by an independent contractor, see **Western Stock Center, Inc. v. Sevit, Inc.**, 195 Colo. 372, 578 P.2d 1045 (1978).

3. "Absent retention of control or an agreement to maintain, a landlord is not obligated to make repairs on leased premises, even if the premises are in a dangerous condition and repairs are necessary to render it safe and suitable for tenant's use and occupancy." **Ogden v. McChesney**, 41 Colo. App. 191, 193, 584 P.2d 636, 637 (1978).

## **D. AMUSEMENT PARK DEVICES—SKI LIFTS— OPERATOR'S DUTY OF CARE**

### **12:13 AMUSEMENT DEVICES AND SKI LIFTS— DUTY OF CARE WHERE USER LACKS FREEDOM OF MOVEMENT**

**Instruction deleted.**

#### **Note**

This instruction has been deleted in its entirety for the reason stated in paragraph 6 of the Introductory Note to this Chapter.



## E. LATERAL AND SUBJACENT SUPPORT

### 12:14 LANDOWNER'S RIGHT TO LATERAL AND SUBJACENT SUPPORT

The owner of the surface of the land is entitled to have that land remain in its natural state, both laterally and subadjacently. Laterally means the right to support the land from the owner of adjoining land. Subadjacently means the right to support from the soil beneath the surface of the land.

The right of support for a person's land means that neither the owner of the surface, nor the owner of the subadjacent rights can destroy, interfere with or damage rights to lateral or subadjacent support of another.

#### Notes on Use

1. When the plaintiff is claiming damages for injuries to improvements, as opposed only to damages for injuries to the natural state of the land, a different rule may be applicable. See Source and Authority below.
2. In some communities, local ordinances, such as notice requirements, may have an effect on one's liability to adjoining landowners.

#### Source and Authority

1. This instruction is supported by **Gladin v. Von Engeln**, 195 Colo. 88, 575 P.2d 418 (1978); and **Vikell Investors Pacific, Inc. v. Kip Hampden, Ltd.**, 946 P.2d 589 (Colo. App. 1997).

2. A landowner has an absolute right to the natural lateral and subadjacent support of the surface of the owner's land, and anyone destroying that support is strictly liable for damages caused to the land and improvements, unless the weight of any improvements (e.g., buildings, fills, etc.) materially contributed to the subsidence, in which event, liability must be based on negligence. To establish strict liability if improvements have been made, the plaintiff must prove that the subsidence would have occurred even if the land had remained in its natural state, and the plaintiff has the burden of overcoming the presumption that the weight of improvements contributed materially to the subsidence. See **Gladin**, 195 Colo. at 93-94, 575 P.2d at 422; **Vikell Inv'rs Pac., Inc.**, 946 P.2d at 593; see also **Burt v. Rocky Mtn. Fuel**

Co., 71 Colo: 205, 205 P. 741 (1922).

THE COURT IN THIS CASE HAS DECIDED THAT THE PLAINTIFFS ARE ENTITLED TO A VERDICT IN THEIR FAVOR.

THE COURT HAS ALSO DECIDED THAT THE DEFENDANTS ARE NOT ENTITLED TO A VERDICT IN THEIR FAVOR. THE COURT HAS THEREFORE GRANTED THE PLAINTIFFS' REQUEST FOR A VERDICT IN THEIR FAVOR.

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## F. PUBLIC PLACES

### 12:15 COLORADO GOVERNMENTAL IMMUNITY ACT

#### No Instruction given.

#### Note

1. When the defense of immunity has been waived, “liability of the public entity shall be determined in the same manner as if the public entity were a private person.” § 24-10-107, C.R.S.; *see also* Introductory Note to this Chapter. Use any instructions in this chapter and in Chapter 8 that are appropriate in light of the evidence in the case.

2. When properly raised, issues of sovereign immunity are to be decided by the trial court, which is the finder of fact with respect to such issues. *See* § 24-10-108, C.R.S.; **Trinity Broad. of Denver, Inc. v. City of Westminster**, 848 P.2d 916 (Colo. 1993); **Daley v. Univ. of Colo. Health Scis. Ctr.**, 111 P.3d 554 (Colo. App. 2005) (waiver of sovereign immunity is issue of subject matter jurisdiction to be determined by trial court); **Kittinger v. City of Colo. Springs**, 872 P.2d 1265 (Colo. App. 1993) (trial court erred in concluding that “business invitee” was not member of public for purposes of “dangerous condition” waiver of sovereign immunity).

3. “[W]hen a plaintiff sues a governmental entity and that entity moves to dismiss for lack of jurisdiction, the plaintiff has the burden of proving jurisdiction under C.R.C.P. 12(b)(1). The court may conduct a **Trinity** hearing at which the parties may present evidence related to all issues of immunity, including facts not in dispute. After the hearing, the court must ‘weigh the evidence and decide the facts’ to satisfy itself of its power to hear the case. In doing so, it must afford the plaintiff the reasonable inferences from his or her evidence. This same lenient standard applies to facts related to both the jurisdictional issue and the merits of the case.” **Dennis v. City & Cty. of Denver**, 2016 COA 140, ¶ 25, 419 P.3d 997 (citations omitted), *rev’d on other grounds*, 2018 CO 37, 418 P.3d 489.

4. As to what public entities may be held liable under the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, C.R.S., (CGIA) for injuries caused by dangerous conditions, see section 24-10-103(5), C.R.S. (defining “public entity”), section 24-10-103(1) (defining “dangerous condition”), and section 24-10-106(1)(c), (d), (e), (f), and (g), C.R.S. (defining more specifically the circumstances when a dangerous condition in a public building, public highway, public facility, etc. will give rise to liability).

5. A low-income housing facility with a private investor with a 99%



ownership interest is an “instrumentality” of a public entity entitled to governmental immunity under the CGIA because of the public’s “extensive control over its operations and because of its public purpose.”

**Martinez v. CSG Redevelopment Partners LLLP**, 2019 COA 91, ¶ 32, 469 P.3d 491, 497.

6. Under the CGIA, claims based on an inadequate or negligent design of a public facility are barred. **Willer v. City of Thornton**, 817 P.2d 514 (Colo. 1991) (city’s alleged negligent failure to post signs warning of a dip at intersection constituted inadequate or negligent design, and therefore, claims based on any such negligence were barred); **Szymanski v. Dep’t of Highways**, 776 P.2d 1124 (Colo. App. 1989) (allegations of “blind spot” in intersection, improper sight lines, an excessive speed limit, and a lack of warning signs were all related to inadequate design and claims based on such allegations were barred).

7. To establish that a dangerous condition exists under the CGIA, the injured party must show that: (1) the injury occurred as a result of a dangerous condition of a public facility; (2) the condition constituted an unreasonable risk to the health or safety of the public; (3) the public entity knew, or in the exercise of reasonable care should have known, that the dangerous condition existed; and (4) the dangerous condition was proximately caused by the negligent act or omission of the public entity in constructing or maintaining the facility. § 24-10-103(1); **Walton v. State**, 968 P.2d 636 (Colo. 1998); **Martinez v. Weld Cty. Sch. Dist. RE-1**, 60 P.3d 736 (Colo. App. 2002); **Luenberger v. City of Golden**, 990 P.2d 1145 (Colo. App. 1999); **Smith v. Town of Snowmass Village**, 919 P.2d 868 (Colo. App. 1996).

8. The CGIA defines “dangerous condition” as a condition that constitutes an “unreasonable risk to health or safety of the public.” § 24-10-103(1.3), C.R.S. To prove an “unreasonable risk,” a plaintiff must prove that the condition created a chance of injury, damage, or loss that exceeded the bounds of reason. **City & Cty. of Denver v. Dennis ex rel. Heyboer**, 2018 CO 37, ¶ 23, 418 P.3d 489.

9. The decisions of the Colorado Supreme Court in **City of Longmont v. Henry-Hobbs**, 50 P.3d 906 (Colo. 2002) (waiver of sovereign immunity for death of child who drowned in irrigation ditch that city had agreement to maintain within city limits), and **City of Colorado Springs v. Powell**, 48 P.3d 561 (Colo. 2002) (waiver of sovereign immunity for death of one child and injuries to another when they fell into drainage ditch owned and maintained by city), were effectively nullified by the general assembly when it added new definitions of “maintenance,” “public sanitation facility,” and “public water facility” to the CGIA, effective July 1, 2003. § 24-10-103 (2.5), (5.5), and (5.7). This statutory amendment applies only prospectively. **City of Colo. Springs v. Powell**, 156 P.3d 461 (Colo. 2007).

10. Before a municipality may be held liable for defects in a public

way caused by a third person, the city must have been on notice of the defect. *See, e.g., Wold v. City of Boulder*, 91 Colo. 44, 9 P.2d 931 (1932); *see also* § 24-10-103(1); *Stephen v. City & Cty. of Denver*, 659 P.2d 666 (Colo. 1983) (interpreting, prior to 1986 amendment, section 24-10-106(1)(d) relating to dangerous conditions of public highways, etc.); *Broderick v. City & Cty. of Denver*, 727 P.2d 881 (Colo. App. 1986) (insufficient evidence that icy condition of sidewalk existed long enough for city to have had constructive notice of it).

11. Once a public entity takes affirmative steps to alleviate a problem, it has a duty to use reasonable care to protect foreseeable plaintiffs. *Martinez v. City of Lakewood*, 655 P.2d 1388 (Colo. App. 1982).

12. Proof of negligence is required in any action against a public entity for injuries resulting from a dangerous condition of, or the operation and maintenance of, a public water facility or sanitation facility. § 24-10-106(4). Therefore, in these kinds of actions, a claim for trespass is barred. *Lawrence v. Buena Vista Sanitation Dist.*, 989 P.2d 254 (Colo. App. 1999).

13. Independent contractors are not “public employees” under the CGIA. § 24-10-103(4)(a); *Henisse v. First Transit, Inc.*, 247 P.3d 577 (Colo. 2011) (employee of independent contractor was not protected by CGIA even when independent contractor contracted with a public entity); *see also Moran v. Standard Ins. Co.*, 187 P.3d 1162 (Colo. App. 2008) (private corporation with contract to administer program for public retirement system did not act as instrumentality of public entity and was not entitled to CGIA immunity); *Safari 300, Ltd. v. Hamilton Family Enters., Inc.*, 181 P.3d 278 (Colo. App. 2007) (only natural persons are entitled to CGIA immunity for public employees); *Robinson v. Colo. State Lottery Div.*, 155 P.3d 409 (Colo. App. 2006) (private store licensed to sell lottery tickets was not instrumentality of the State for CGIA purposes), *aff’d in part and rev’d in part on other grounds*, 179 P.3d 998 (Colo. 2008); *Podboy v. Fraternal Order of Police*, 94 P.3d 1226 (Colo. App. 2004) (labor organization with authority under municipal code to act as sole collective bargaining agent for sheriff’s department is not public entity under the CGIA, and its members and officers are not public employees).

14. “[A] public entity ‘maintains’ a public facility, for the purposes of the immunity waiver in section 24-10-106(1)(f), even if it hires an independent contractor.” *Lopez v. City of Grand Junction*, 2018 COA 97, ¶ 50, 488 P.3d 364, 371.

15. A government’s duty to maintain a road is triggered only after the road presents an unreasonable risk to the public. *City & Cty. of Denver v. Dennis ex rel. Heyboer*, 2018 CO 37, ¶ 18, 418 P.3d 489. A road does not automatically constitute an unreasonable risk because the government has not kept it in the general state of repair as it was initially constructed. *Id.*



### **Sovereign Immunity Waived**

16. For Colorado Supreme Court cases holding that sovereign immunity was waived, see **Smokebrush Foundation v. City of Colorado Springs**, 2018 CO 10, ¶ 29, 410 P.3d 1236 (coal tar contamination from coal gasification plant is an injury resulting from the historic operation or maintenance of a public gas facility); **St. Vrain Valley School District RE-1J v. A.R.L.**, 2014 CO 33, ¶¶ 35-36, 325 P.3d 1014 (playground of public elementary school is a “public facility” located in a “recreation area” under CGIA); **Daniel v. City of Colorado Springs**, 2014 CO 34, ¶¶ 32-33, 327 P.3d 891 (parking lot of public golf course is “public facility” located in a “recreation area” under CGIA); **Powell**, 48 P.3d at 563-64 (death of one child and injuries to another when they fell into drainage ditch owned and maintained by city); **Medina v. State**, 35 P.3d 443 (Colo. 2001) (distinguishing between “maintenance” and “design” of public way and holding that immunity is waived for negligent maintenance but not for negligent design or failure to warn); **Springer v. City & County of Denver**, 13 P.3d 794 (Colo. 2000) (negligent failure to detect physical defects in building constructed by independent contractor); **Corsentino v. Cordova**, 4 P.3d 1082 (Colo. 2000) (sheriff’s deputy who endangered life in driving vehicle responding to burglary alarm not entitled to benefit of emergency vehicle exception to waiver of immunity); **State v. Nieto**, 993 P.2d 493 (Colo. 2000) (acts of public employees in course of operating state’s correctional facilities); **Walton**, 968 P.2d at 645-46 (injuries sustained by plaintiff when ladder used to clean storage space in public facility slipped out from under her); **State v. Moldovan**, 842 P.2d 220 (Colo. 1992) (highway department failed to maintain fence so as to prevent calf from running onto highway); **City of Aspen v. Meserole**, 803 P.2d 950 (Colo. 1990) (dangerous condition on municipal sidewalk); and **Stephen**, 659 P.2d at 667-68 (stop sign facing improper direction).

17. For recent Colorado Court of Appeals cases holding that sovereign immunity was waived, see **McKinley v. City of Glenwood Springs**, 2015 COA 126, ¶¶ 6-7, 11, 361 P.3d 1080 (five-inch depression in municipal parking lot was a dangerous condition that interfered with the movement of traffic); **Colucci v. Town of Vail**, 232 P.3d 218 (Colo. App. 2009) (“sidewalk” included pedestrian way perpendicular to roadway); **Herrera v. City & County of Denver**, 221 P.3d 423 (Colo. App. 2009) (snowplow is motor vehicle under CGIA); **Douglas v. City & County of Denver**, 203 P.3d 615 (Colo. App. 2008) (in wrongful death claim arising from weight lifting accident, city waived immunity by constructing weight room in recreation center without adequate warning signs, by failing to observe, assist, or warn plaintiff of risks of weightlifting, and by failing to monitor and supervise the weight room adequately); **Lauck v. E-470 Public Highway Authority**, 187 P.3d 1148 (Colo. App. 2008) (E-470 a type of federal road included within immunity waiver); **Montoya v. City of Westminster Department of Public Works**, 181 P.3d 1197 (Colo. App. 2008) (open water meter pit in parking lot part of structure used in collection, treatment, and distribution of domestic water); **Lin v. City of Golden**, 97 P.3d 303 (Colo.



App. 2004) (wrongful death of pedestrian killed by automobile after dark in intersection where street light was not lit); **Ellis v. Town of Estes Park**, 66 P.3d 178 (Colo. App. 2002) (injuries allegedly sustained by plaintiff when she tripped over manhole cover of electric vault owned, operated, and maintained by town as part of its electrical supply system); **Booth v. University of Colorado**, 64 P.3d 926 (Colo. App. 2002) (injuries sustained by student at state university when dry erase board fell over), *aff'd on other grounds*, 78 P.3d 1098 (Colo. 2003); **Wisdom v. City of Sterling**, 36 P.3d 106 (Colo. App. 2001) (water meter pit owned by city, located on property owned, operated, and maintained by city, constituted "public water facility" within meaning of statute waiving sovereign immunity); **Flores v. Colorado Department of Corrections**, 3 P.3d 464 (Colo. App. 1999) (injuries sustained by prison visitor when she slipped and fell on wet floor); **DeForrest v. City of Cherry Hills Village**, 990 P.2d 1139 (Colo. App. 1999) (dangerous condition created by city when it erected temporary stop signs that might have conflicted with traffic light); **Mason v. Adams**, 961 P.2d 540 (Colo. App. 1997) (dangerous condition of sand and gravel on roadway); **Denmark v. State**, 954 P.2d 624 (Colo. App. 1997) (injuries sustained as a result of dangerous condition of athletic field on higher education campus because athletic field was "recreation area"); **Jilot v. State**, 944 P.2d 566 (Colo. App. 1997) (damages caused by gasoline leakage from underground storage tanks if, on remand, trial court determined that storage tanks were fixtures); and **Smith v. Town of Estes Park**, 944 P.2d 571 (Colo. App. 1996) (injuries sustained when plaintiff slipped and fell on ice that had accumulated in cross-pan of town's storm drainage system).

18. For earlier Colorado Court of Appeals cases holding that sovereign immunity was waived, see **Scott v. City of Greeley**, 931 P.2d 525 (Colo. App. 1996) (property damage resulting from storm sewer flooding which occurred because city departed from design plan when it connected larger pipe to existing smaller pipe); **Johnson v. Regional Transportation District**, 916 P.2d 619 (Colo. App. 1995) (injuries sustained by bus passenger who was injured when she was struck by another vehicle after disembarking from bus while bus was stopped in traffic lane); **Hallam v. City of Colorado Springs**, 914 P.2d 479 (Colo. App. 1995) (injuries allegedly sustained as a result of city's failure to properly maintain barricades because barricades were traffic safety devices, not traffic markings); **Hendricks v. Weld County School District No. 6**, 895 P.2d 1120 (Colo. App. 1995) (injuries sustained by student when he slid into unpadded wall of school gymnasium); **Longbottom v. State Board of Community Colleges & Occupational Education**, 872 P.2d 1253 (Colo. App. 1993) (injuries sustained by student while operating "jointer" machine in junior college building); **Belfiore v. Colorado State Department of Highways**, 847 P.2d 244 (Colo. App. 1993) (injuries sustained when boulder struck automobile on public highway); **Morgan v. Board of Water Works**, 837 P.2d 300 (Colo. App. 1992) (danger posed by protruding water valve covers in street); and **Schlitters v. State**, 787 P.2d 656 (Colo. App. 1989) (dangerous condition resulting from boulder falling onto public highway).

**Sovereign Immunity Not Waived**

19. For Colorado Supreme Court cases holding that sovereign immunity was not waived, see **City & County of Denver v. Dennis ex rel. Heyboer**, 2018 CO 37, ¶ 2, 418 P.3d 489 (road did not constitute an unreasonable risk to health and safety of the public or physically interfere with the movement of traffic); **Smokebrush Foundation v. City of Colorado Springs**, 2018 CO 10, ¶ 29, 410 P.3d 1236 (airborne asbestos contaminants released during demolition of a building are not caused by the negligent act or omission in constructing or maintaining a facility); **St. Vrain Valley School District RE-1J v. Loveland**, 2017 CO 54, ¶ 24, 395 P.3d 751, 757 (“A non-negligently constructed and maintained piece of playground equipment cannot be a ‘dangerous condition’ under the CGIA’s recreation-area waiver.”); **Burnett v. State Department of Natural Resources**, 2015 CO 19, ¶¶ 24, 36, 44, 46, 346 P.3d 1005 (in case where camper sustained injuries in state park when tree branch fell on her, the court held that a tree is a “natural condition of . . . unimproved property” regardless of proximity to public facility, and overruled the “public facility” test in **Rosales v. City & County of Denver**, 89 P.3d 507 (Colo. App. 2004)); **Young v. Brighton School District 27J**, 2014 CO 32, ¶¶ 34-35, 325 P.3d 571 (walkway not, in and of itself, a “public facility” for purposes of CGIA waiver of immunity for “recreation areas”); **Medina**, 35 P.3d at 454-55 (distinguishing between “maintenance” and “design” of public way and holding that immunity is waived for negligent maintenance but not for negligent design or failure to warn); **Padilla v. School District No. 1**, 25 P.3d 1176 (Colo. 2001) (injuries sustained by elementary school student when stroller tipped over); **Swieckowski v. City of Fort Collins**, 934 P.2d 1380 (Colo. 1997) (hazard created by improvement to roadway since hazard was solely result of inadequate design); **City & County of Denver v. Gallegos**, 916 P.2d 509 (Colo. 1996) (injuries sustained by pedestrian when he stepped on cover plate for water meter pit on private property); **Jenks v. Sullivan**, 826 P.2d 825 (Colo. 1992) (action by person shot in county courthouse), *overruled on other grounds by* **Bertrand v. Board of County Commissioners**, 872 P.2d 223 (Colo. 1994); and **Bloomer v. Board of County Commissioners**, 799 P.2d 942 (Colo. 1990) (dangerous conditions on county roads), *overruled on other grounds by* **Bertrand**, 872 P.2d at 227.

20. For recent Colorado Court of Appeals cases holding that sovereign immunity was not waived, see **Martinez**, 2019 COA 91, ¶ 34, 469 P.3d at 497 (injuries sustained by plaintiff on icy walkway since low-income housing facility is not a “public building open for public business” because it functions as a private residence); **Ackerman v. City & County of Denver**, 2015 COA 96M, ¶ 30, 373 P.3d 665 (injuries sustained by plaintiffs when rocks fell from rock formation abutting city amphitheater since the court held that a rock formation “is a natural condition of unimproved property”); **Wark v. Board of County Commissioners**, 47 P.3d 711 (Colo. App. 2002) (counties not included in statutory waiver of immunity for dangerous conditions of roadways); **Moore v. City & County of Denver**, 42 P.3d 82 (Colo.



App. 2002) (injuries to pedestrian who was injured on crosswalk controlled by properly functioning pedestrian signal); **Richardson v. Starks**, 36 P.3d 168 (Colo. App. 2001) (injuries suffered by elementary school pupil who was assaulted by another pupil on school playground); **deBoer v. Ute Water Conservancy District**, 17 P.3d 187 (Colo. App. 2000) (injuries sustained by plaintiff when she fell into water meter pit owned and operated by district since pit was not "public facility"); **Jaffe v. City & County of Denver**, 15 P.3d 806 (Colo. App. 2000) (city's alleged failure to establish medical assistance system, automatic lighting system, foul weather detection system, or evacuation plan on golf course); **Seder v. City of Fort Collins**, 987 P.2d 904 (Colo. App. 1999) (injuries sustained by plaintiff when she slipped and fell on icy sidewalk outside recreation center owned and maintained by city, unless city had actual knowledge of dangerous condition of sidewalk); and **Lyons v. City of Aurora**, 987 P.2d 900 (Colo. App. 1999) (dangerous condition allegedly resulting from failure of traffic signals to provide sufficient time for pedestrian to cross intersection).

21. For earlier Colorado Court of Appeals cases holding that sovereign immunity was not waived, see **Horrell v. City of Aurora**, 976 P.2d 315 (Colo. App. 1998) (injuries sustained by plaintiff when he fell into water pit owned and maintained by city); **Delk v. City of Grand Junction**, 958 P.2d 532 (Colo. App. 1998) (in case involving injuries sustained by plaintiff when he attempted to prevent trash dumpster located on restaurant's property from rolling into car; dumpster was not "public sanitation facility"); **Stockwell v. Regional Transportation District**, 946 P.2d 542 (Colo. App. 1997) (injuries sustained by bus passenger allegedly attacked by other passengers); **Stanley v. Adams County School District 27J**, 942 P.2d 1322 (Colo. App. 1997) (injuries sustained by delivery person when she slipped and fell on school's driveway because driveway did not constitute a public highway, road, or street, was not sidewalk and was not dangerous condition of public building); **Reynolds v. State Board for Community Colleges & Occupational Education**, 937 P.2d 774 (Colo. App. 1996) (injuries sustained by plaintiff while cleaning printing press, unless plaintiff establishes that printing press was "fixture"); **Smith**, 919 P.2d at 871-72 (where town did not have actual or constructive notice of dangerous condition created by ice on lower landing of stairway); **Click v. Board of County Commissioners**, 923 P.2d 347 (Colo. App. 1996) (dangerous conditions on county roads); **DiPaolo v. Boulder Valley School District, RE-2**, 902 P.2d 439 (Colo. App. 1995) (injuries sustained when plaintiff exited damaged and inoperable school bus that was being used as immobile exhibit in safety display); **Pack v. Arkansas Valley Correctional Facility**, 894 P.2d 34 (Colo. App. 1995) (claim of correctional facility visitor who was injured when he slipped and fell on ice in handicapped zone of facility parking lot); **Lafitte v. State Highway Department**, 885 P.2d 338 (Colo. App. 1994) (claim based on alleged failure of highway department to provide adequate traffic warning signs), *overruled on other grounds by Regional Transportation District v. Lopez*, 916 P.2d 1187 (Colo. 1996); **Montes v. Hyland Hills Park & Recreation District**, 849 P.2d 852 (Colo.



App. 1992) (injuries caused by negligently maintained golf cart rented to patron of public golf course); **Howard v. City & County of Denver**, 837 P.2d 255 (Colo. App. 1992) (claims by survivors of woman killed by her husband after he was released from county jail); **Odenbaugh v. County of Weld**, 809 P.2d 1059 (Colo. App. 1990) (dangerous condition on county road); and **Mentzel v. Judicial Department**, 778 P.2d 323 (Colo. App. 1989) (dispensing alcoholic beverages to public employees in public building).

**12:16 DUTY OF CARE BY USER OF PUBLIC WAY**

**A person using (sidewalks) (streets) (crosswalks) must use reasonable care for his or her own safety, under the circumstances and the conditions known or which should have been known to that person.**

**Notes on Use**

1. Use whichever parenthesized word is most appropriate.
2. Whenever this instruction is given, Instruction 9:8, defining "reasonable care," should also be given.
3. If the plaintiff is required under section 13-21-115, C.R.S., to establish liability by proving more than ordinary negligence, then this instruction, relating as it does to ordinary contributory negligence, may not be applicable, since such conduct on the plaintiff's part may not be a defense to the more serious conduct the plaintiff would need to prove on the defendant's part. *Compare Carman v. Heber*, 43 Colo. App. 5, 601 P.2d 646 (1979) (comparative negligence not a defense to an intentional tort), with *G.E.C. Minerals, Inc. v. Harrison W. Corp.*, 781 P.2d 115 (Colo. App. 1989) (comparative negligence a defense to "willful and reckless" negligence).
4. This instruction, appropriately modified, may also be used in cases involving other public facilities. *See Russo v. Birrenkott*, 770 P.2d 1335 (Colo. App. 1988) (hazardous conditions at public recreational area).

**Source and Authority**

This instruction is supported by *City of Alamosa v. Johnson*, 99 Colo. 134, 60 P.2d 1087 (1936); and *City & County of Denver v. Caton*, 108 Colo. 170, 114 P.2d 553 (1941). *See also City & Cty. of Denver v. Willson*, 81 Colo. 134, 254 P. 153 (1927) (plaintiff's knowledge of the defect alone does not make the plaintiff contributorily negligent).

**12:17 NEGLIGENCE CHOICE OF ROUTE**

A person who takes a route when that person knows or ought reasonably to know of a safer route is negligent if a reasonably careful person would have taken the safer way under the same or similar circumstances to protect (himself) (herself) (or) (others) from (bodily injury) (death) (property damage).

**Notes on Use**

1. Use whichever parenthesized words and phrases are most appropriate.

2. As the cases in the Source and Authorities indicate, this instruction is not limited to situations involving only public ways.

3. The failure on the part of a plaintiff to comply with the duty set out in this instruction constitutes contributory negligence if such failure was a cause of the plaintiff's injuries. *See* cases cited in Source and Authority. Under comparative negligence, however, *see* Instructions 9:26–9:28D, the failure of the plaintiff to have taken the safer way does not necessarily relieve the defendant of liability for any negligence of the defendant relating to the way taken which also proximately caused the plaintiff's injuries. **Betoney v. Union Pac. R.R.**, 701 P.2d 62 (Colo. App. 1984).

4. This instruction should not be given unless there is sufficient evidence for the jury to find that the person knew or as a reasonably careful person ought to have known of the hazard involved in the route selected. **Martinez v. W.R. Grace Co.**, 782 P.2d 827 (Colo. App. 1989).

**Source and Authority**

This instruction is supported by **City of Aurora v. Woolman**, 165 Colo. 377, 439 P.2d 364 (1968) (user must know or reasonably should have known the chosen route was unsafe); **Fox v. Martens**, 132 Colo. 208, 286 P.2d 628 (1955) (plaintiff negligent in not taking safer alternative route on own property to avoid condition allegedly created by defendant's negligence); and **Midland Terminal Railway v. Patton**, 74 Colo. 132, 219 P. 781 (1923) (employee contributorily negligent in taking more hazardous route on employer's premises). *See also* **Denver & Rio Grande R.R. v. Komfala**, 69 Colo. 318, 194 P. 615 (1920).



## G. VIOLATION OF STATUTE OR ORDINANCE

### 12:18 VIOLATION OF STATUTE OR ORDINANCE— EVIDENCE OF FAILURE TO EXERCISE REASONABLE CARE

At the time of the occurrence in question in this case, the following (statute[s]) (ordinance[s]) of the [name of municipal corporation], State of Colorado (was) (were) in effect:

*(insert quotation of applicable statute[s] or ordinance[s]).*

If you find the defendant, (name), violated (this) (these) (statute[s]) (ordinance[s]), you may consider this violation as evidence that the defendant failed to exercise reasonable care. You must consider this evidence along with all other evidence in determining whether the defendant exercised reasonable care.

#### Notes on Use

1. Under section 13-21-115, C.R.S., a failure to comply with a statute, ordinance, or building code may be considered as evidence of a failure to exercise reasonable care. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 187 P.3d 565 (Colo. 2008). However, a defendant's knowledge of a violation of the building code does not establish knowledge that the violation created a dangerous condition. **Lombard v. Colo. Outdoor Educ. Ctr., Inc.**, 266 P.3d 412 (Colo. App. 2011).

2. In premises liability cases brought under section 13-21-115, C.R.S., this instruction should be used instead of Instruction 9:14 (violation of statute or ordinance as negligence per se), which applies in negligence cases.

3. For a definition of reasonable care, see Instruction 9:8.

#### Source and Authority

This instruction is supported by **Lombard**, 266 P.3d at 416-17.

## CHAPTER 13. ANIMALS

- 13:1 Domestic Animals—Dangerous or Vicious Tendencies—  
Elements of Liability
- 13:2 Wild Animals—Elements of Liability
- 13:3 Serious Bodily Injury or Death Resulting From Being Bitten  
by A Dog—Elements of Liability
- 13:4 Serious Bodily Injury—Defined
- 13:5 Damages

### 13:1 DOMESTIC ANIMALS—DANGEROUS OR VICIOUS TENDENCIES—ELEMENTS OF LIABILITY

**For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim, you must find that all the following have been proved by a preponderance of the evidence:**

**1. The defendant (owned) (kept) (had [control] [custody] of) a *(insert description of kind or breed of animal or animals, e.g., cat, horse, Doberman pinscher, German shepherd, etc.)*;**

**2. The *(insert same description used in paragraph 1)* had vicious or dangerous tendencies;**

**3. The defendant knew or had notice that the *(insert same description used in paragraph 1)* had vicious or dangerous tendencies;**

**(4. The defendant was negligent in that *(he)* *(she)* did not use reasonable care to prevent injuries or damages that could have reasonably been anticipated to be caused by the dangerous or destructive tendencies of the *(insert same description used in paragraph 1)*);**

**5. The plaintiff had *(injuries)* *(damages)* *(losses)*; and**

**6. The (defendant's negligence) (vicious or dangerous tendencies of [insert same description used in paragraph 1]) was a cause of the plaintiff's (injuries) (damages) (losses).**

**If you find that any one or more of these statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these (number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. This instruction should be given only if the court has determined that the defendant owed a duty of care to the plaintiff to protect against the alleged injury. **N.M. v. Trujillo**, 2017 CO 79, ¶ 46, 397 P.3d 370 (citing this Instruction 13:1 and its Notes on Use, and holding that dog owner did not owe a duty of care to plaintiff because there was no special relationship between the parties, the plaintiff was not directly injured by the dogs or on the dog owner's property, the dogs remained confined and never left the property, and plaintiff's injuries resulted from being struck by car after jumping into street).

2. Whenever paragraph 4 of this instruction is given, Instruction 9:6, defining "negligence," and 9:8, defining "reasonable care," should also be given.

3. In dog-bite cases involving death or "serious bodily injury" under section 13-21-124, C.R.S., Instruction 13:3 should be used rather than this instruction. In cases where a dog bite does not result in death or



“serious bodily injury” as defined by section 18-1-901(3)(p), C.R.S., then this instruction is applicable, but the claim is subject to the affirmative defenses set forth in section 13-21-124(5).

4. There is some uncertainty as to the elements necessary to establish liability for injuries caused by a domestic animal with dangerous or vicious propensities. Several older cases hold, in effect, that if a person who owns or keeps an animal knows or is on notice that the particular animal is dangerous or destructive, then that person is strictly liable for injuries proximately caused by a failure to keep the animal secured. In **Barger v. Jimerson**, 130 Colo. 459, 462, 276 P.2d 744, 745 (1954), for example, the court, in upholding a verdict against a dog’s owners, stated that, “[i]t is quite evident that defendants did not at any time carelessly or intentionally allow the dog to run at large. Their liability was in keeping such a dog and they did so at their peril.” In **Melsheimer v. Sullivan**, 1 Colo. App. 22, 28, 27 P. 17, 19 (1891), the court concluded that “the three allegations necessary to be made and proved in a case of this character—First, that the dog was vicious . . . ; second, that the defendant knew it; third, that [the dog] bit and injured the plaintiff without any neglect or fault on [plaintiffs] part . . . .” The **Melsheimer** case was cited with approval by the Colorado Supreme Court in **Barger** and in **Carlberg v. Willmott**, 87 Colo. 374, 287 P. 863 (1930). These cases conclude, in effect, that the keeping of an animal that the owner knows or should know has dangerous or vicious propensities is conclusively presumed to be negligent.

5. The Colorado Supreme Court, citing with approval the preceding notes 1 and 4 to this instruction, acknowledged that the earlier cases “appear to be premised on a theory of strict liability arising from injuries caused by dangerous or vicious animals.” **Trujillo**, 2017 CO 79, ¶ 39, 397 P.3d at 375. The **Trujillo** Court did not settle the issue because the only question before it was whether the plaintiff properly pleaded a viable negligence claim. *Id.* at ¶¶ 41, 48. The **Trujillo** Court left open the possibility of a negligence action, stating, “even if [the earlier Colorado cases] could, in certain circumstances, support a viable negligence claim, notwithstanding the absence of a special relationship between the parties, this is not such a case[.]” *Id.* at ¶ 44, 397 P.3d at 376.

6. The same rationale underlines the rule that someone who keeps a wild animal is strictly liable for any injury or damages caused by that animal. See **Collins v. Otto**, 149 Colo. 489, 369 P.2d 564 (1962). There is an exception to this rule where the animal is being kept by public entity for the benefit of the public at large, as in a zoo. **City & Cty. of Denver v. Kennedy**, 29 Colo. App. 15, 476 P.2d 762 (1970). See Instruction 13:2.

7. In contrast to the cases cited above, several Colorado Court of Appeals decisions have stated, “In order to prove the owner of a domestic animal is negligent, a plaintiff must show: (1) that the animal had vicious or dangerous tendencies; (2) that the owner had knowledge or

notice thereof; and (3) that the owner did not exercise reasonable care to prevent injuries reasonably anticipated to result from such tendencies.” **Sandoval v. Birx**, 767 P.2d 759, 761 (Colo. App. 1988). In **Sandoval**, the court relied on **Dubois v. Myers**, 684 P.2d 940 (Colo. App. 1984), and the **Dubois** court relied on **Swerdfeger v. Krueger**, 145 Colo. 180, 358 P.2d 479 (1960). The court’s reliance on **Swerdfeger** appears to be misplaced, however, because in **Swerdfeger**, the supreme court simply concluded that a 13-year-old boy who was bitten by a dog was barred from recovering against the dog’s owner because the boy was contributorily negligent as a matter of law. Indeed, the court in **Swerdfeger** relied on both the **Melsheimer** and **Barger** cases to establish that contributory negligence was a defense. More recently, the court of appeals has held that it was appropriate to instruct the jury based on Instruction 13:1, including the element that: “The defendant was negligent in that [he] did not use reasonable care to prevent injuries or damages that could have reasonably been anticipated to be caused by the dangerous or destructive tendencies of the [animal].” **Fishman v. Kotts**, 179 P.3d 232, 236 (Colo. App. 2007) (citing **Sandoval**, 767 P.2d at 761, and **Dubois**, 684 P.2d at 942). However, **Fishman** “did not address the question of whether and when a duty arises.” **Trujillo**, 2017 CO 79, ¶ 47, 397 P.3d at 376.

8. Paragraph 4 of this instruction has been included as an element, but put in parentheses to highlight the uncertainty raised by the court of appeals decisions in **Sandoval** and **Dubois** as to the elements that must be proved to establish the liability or negligence of the owner of a domestic animal with vicious or dangerous propensities. Also, the first parenthesized phrase in numbered paragraph 6 should not be used if paragraph 4 is not included in the instruction.

9. In cases where recovery for personal injuries from the owner of a domestic animal is not predicated on the dangerous or vicious propensities of the animal, the instructions on negligence in Chapter 9 apply. See, e.g., **Millard v. Smith**, 30 Colo. App. 466, 495 P.2d 234 (1972) (actionable claim stated in complaint alleging that plaintiff struck defendant’s cow on highway and that occurrence was proximately caused by defendant’s negligence); see also **Lui v. Barnhart**, 987 P.2d 942 (Colo. App. 1999) (doctrine of *res ipsa loquitur* not applicable in negligence action by motorist who collided with horse owned by defendant); cf. **De Witt v. Hill**, 143 Colo. 372, 352 P.2d 81 (1960) (negligence action by motorcyclist who hit cow on highway was properly dismissed because there was no proof that defendant owned or controlled cow). Contributory negligence and assumption of the risk were held to be defenses to a claim against an owner of domestic animal for injuries caused by that animal. **Davis v. Roberts**, 155 Colo. 387, 395 P.2d 13 (1964). See Instructions 9:22 and 9:23 as well as Introductory Note to Part C of Chapter 9.

### Source and Authority

1. This instruction is supported by **Fishman**, 179 P.3d at 236 (ap-

proving Instruction 13:1 for use in case involving non-vicious dog that caused injury by running underneath a horse and rider). *See also* **Trujillo**, 2017 CO 79, ¶¶ 46-47 (citing this instruction and **Fishman's** approval of the instruction).

2. For a discussion as to the definition of a “keeper” of an animal, see **Snow v. Brit**, 968 P.2d 177 (Colo. App. 1998).

3. For the statutory exemption from civil liability for injuries resulting from “equine activities” and “llama activities,” see section 13-21-119, C.R.S. *See also* **Clyncke v. Waneka**, 157 P.3d 1072 (Colo. 2007) (interpreting statute and discussing whether jury instruction correctly embodied statutory language).

4. For claims of strict liability for trespass by livestock, see **Robinson v. Kerr**, 144 Colo. 48, 355 P.2d 117 (1960); and **Mikes v. Burnett**, 2013 COA 97, ¶¶ 9-10, 411 P.3d 43.

5. In cases where the plaintiff is injured by an animal on the property of another, the Colorado Premises Liability Act, § 13-21-115, C.R.S. abrogates any common law claims against the landowner. *See* **Legro v. Robinson**, 2012 COA 182, ¶ 20, 328 P.3d 238, *aff'd on other grounds*, 2014 CO 40, 325 P.3d 1053; *see also* **Legro v. Robinson**, 2015 COA 183, 369 P.3d 785 (interlocutory appeal on remand).



**13:2 WILD ANIMALS—ELEMENTS OF LIABILITY**

**For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) claim of strict liability, you must find that all the following have been proved by a preponderance of the evidence:**

- 1. The defendant (owned) (kept) (had [control] [custody] of) a *(insert description of wild animal, e.g., bear)*;**
- 2. The plaintiff had (injuries) (damages) (losses);**
- 3. The *(insert same description used in paragraph 1)* was a cause of the plaintiff's (injuries) (damages) (losses).**

**If you find that any one or more of these *(numbers)* statements has not been proved, then your verdict must be for the defendant.**

**On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

**Notes on Use**

See the Notes on Use to Instruction 13:1.

### Source and Authority

This instruction is supported by **Collins v. Otto**, 149 Colo. 489, 369 P.2d 564 (1962) (coyote); and **City & County of Denver v. Kennedy**, 29 Colo. App. 15, 476 P.2d 762 (1970) (in a case involving a zebra at a city-owned zoo, the court stated the rule of strict liability for harboring wild animals but held that an exception exists for public entities).

### **13:3 SERIOUS BODILY INJURY OR DEATH RESULTING FROM BEING BITTEN BY A DOG—ELEMENTS OF LIABILITY**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim for serious bodily injury, you must find that all the following have been proved by a preponderance of the evidence:

1. The defendant (owned) (kept) (had [control] [custody] of) a dog;
2. The plaintiff was bitten by the defendant's dog;
- (3. When [he] [she] was bitten by the defendant's dog, the plaintiff was lawfully on [the defendant's] [(his) (her) own] [public] [another's] property;)
4. The plaintiff (had serious bodily injuries) (died); and
5. The dog bite was a cause of plaintiff's (serious bodily injury) (death).

If you find that any one or more of these statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense



**has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. See the Notes on Use to Instruction 13:1.
2. In cases where the plaintiff dies as a result of being bitten by a dog, this instruction should be used in conjunction with the instructions in Chapter 10 on wrongful death.
3. For instructions relating to claims under the Colorado Premises Liability Act, see Chapter 12.
4. It is unclear whether the “lawfully on public or private property” element in paragraph 3 of the instruction is an element of plaintiff’s case, as suggested by section 13-21-124(2), C.R.S., or whether it is an affirmative defense, as suggested by section 13-21-124(5)(a). However, at least one Colorado Court of Appeals case appeared to consider the language “lawfully on public or private property” to be part of the plaintiff’s elements of proof. See **Legro v. Robinson**, 2015 COA 183, ¶ 34, 369 P.3d 785. In the absence of any definitive appellate decisions on this question, the Committee takes no position.

#### Source and Authority

1. This instruction is supported by section 13-21-124, and **Legro v. Robinson**, 2012 COA 182, ¶ 19, 328 P.3d 238, *aff’d on other grounds*, 2014 CO 40, 325 P.3d 1053. See also **Legro**, 2015 COA 183.
2. The “exclusions” from liability identified in section 13-21-124(5) are in the nature of affirmative defenses; the Colorado Court of Appeals stated that, under section 13-21-124, “a defendant may avoid liability by proving one of the statutory exclusions.” **Legro**, 2012 COA 182, ¶ 25.
3. The exclusion applicable to dog bites that occur “[w]hile the dog is working as a hunting dog, herding dog, farm or ranch dog, or predator control dog on the property of or under the control of the dog’s owner,” § 13-21-124(5)(f), applies “when a bite occurs on the dog owner’s property or when the dog is working under the control of the dog owner.” **Robinson v. Legro**, 2014 CO 40, ¶ 23, 325 P.3d 1053, 1059.
4. In cases where a plaintiff is bitten by a dog while on the property of another, the plaintiff may assert claims against the “landowner” of that property under both section 13-21-124 and under the Colorado Premises Liability Act, § 13-21-115, C.R.S. See **Legro**, 2012 COA 182, ¶¶ 25-27.

**13:4 SERIOUS BODILY INJURY—DEFINED**

**“Serious bodily injury” means bodily injury that, either at the time of the actual injury or at a later time, involves:**

- (a) A substantial risk of death; or**
- (b) A substantial risk of serious permanent disfigurement; or**
- (c) A substantial risk of protracted loss or impairment of the function of any part or organ of the body; or**
- (d) Breaks, fractures, or burns of the second or third degree.**

**Notes on Use**

This instruction should be given whenever Instruction 13:3 is given and there is a factual dispute as to whether the plaintiff sustained serious bodily injury.

**Source and Authority**

This instruction is supported by sections 18-1-901(3)(p), and 13-21-124(1)(d), C.R.S.

**13:5 DAMAGES**

**Use Instruction 6:1, 6:1A, and 6:1B.**

**Note**

1. See the Notes on Use and Source and Authority to Instruction 6:1.
2. In claims based on section 13-21-124(2), C.R.S., the statute provides for the recovery of “economic damages.” The Committee takes no position on whether pecuniary losses are the exclusive remedy pursuant to the statute.
3. In cases where a plaintiff asserts claims based on section 13-21-124 and the Colorado Premises Liability Act, § 13-21-115, C.R.S., the plaintiff may seek to recover economic damages under section 13-21-124 and “damages beyond economic damages” under section 13-21-115. **Legro v. Robinson**, 2012 COA 182, ¶ 25, 328 P.3d 238, *aff’d on other grounds*, 2014 CO 40, 325 P.3d 1053.



## CHAPTER 14. PRODUCT LIABILITY

### Introductory Note

#### A. STRICT PRODUCT LIABILITY

- 14:1 Elements of Liability
- 14:2 Manufacturer—Defined
- 14:3 Defective, Unreasonably Dangerous—Defined
- 14:4 Warnings and Instructions
- 14:5 Presumptions—Noncompliance With Governmental Standards
- 14:5A Presumptions—Compliance With Governmental Standards
- 14:5B Presumptions—Ten-Year Use of Product
- 14:6 State-of-the-Art
- 14:7 Damage Alone Not Proof Product was Defective or Unreasonably Dangerous

#### B. PRODUCT LIABILITY FOR BREACH OF WARRANTY

- 14:8 Breach of Express Warranty Under U.C.C.—Elements of Liability
- 14:9 Express Warranty—Defined
- 14:10 Breach of Implied Warranty of Merchantability—Elements of Liability
- 14:11 Implied Warranty of Merchantability—Defined
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## Introductory Note

1. As the law of product liability has developed in Colorado, claims are available for strict product liability for defective products (Instructions 14:1 to 14:7), for product misrepresentation (Instructions 14:22 to 14:24), for breach of warranty (Instructions 14:8 to 14:16), and for negligence (Instructions 14:17 to 14:21). The defenses to those claims are set forth in Instructions 14:25 to 14:29, and the remaining instructions set out the verdict carrying instructions and verdict forms (Instructions 14:30 to 14:33B).

2. The law of strict product liability was first endorsed in Colorado in the 1970s. *See Hiigel v. Gen. Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975); *Bradford v. Bendix-Westinghouse Auto. Air Brake Co.*, 33 Colo. App. 99, 517 P.2d 406 (1973). Before claims for strict liability were recognized, actions against product manufacturers and sellers proceeded under the tort theory of negligence and the contract theory of warranty. *See, e.g., Am. Furniture Co. v. Veazie*, 131 Colo. 340, 281 P.2d 803 (1955). Until 1971, negligence claims could be completely barred by a plaintiff's contributory negligence, *see* § 13-21-111, C.R.S. (adopting comparative negligence), while claims for breach of warranty required privity of contract between the injured person and the defendant. *See White v. Rose*, 241 F.2d 94 (10th Cir. 1957) (imposing privity requirement under Colorado law); *Senter v. B.F. Goodrich Co.*, 127 F. Supp. 705 (D. Colo. 1954) (same); *see also H.B. Bolas Enters., Inc. v. Zarlengo*, 156 Colo. 530, 400 P.2d 447 (1965) (privity required in action for breach of implied warranty of merchantability against builder/vendor of newly constructed building). Lack of notice within a reasonable time was also a defense to a plaintiff's right to recover based on breach of warranty. *Am. Furniture Co.*, 131 Colo. at 344, 281 P.2d at 805; *see* § 4-2-607(3)(a), C.R.S. The adoption of the Uniform Commercial Code (UCC) in 1965, §§ 4-1-101 to 4-11-102, C.R.S., eased the restrictions imposed by contract law's privity requirement, *see* §§ 4-2-313, cmt. 2 & 4-2-318, C.R.S., but timely notice was and remains a condition precedent to recovery. § 4-2-607(3)(a), C.R.S.; *see* Instruction 14:15 (notice of breach of warranty).

3. In 1965, the American Law Institute created a new cause of action, advancing a more liberal theory of recovery in product liability actions. RESTATEMENT (SECOND) OF TORTS § 402A (1965). This tort theory of strict product liability was formally adopted by the Colorado Court of Appeals in 1973, *see Bradford*, 33 Colo. App. at 107, 517 P.2d at 411, and two years later by the Colorado



Supreme Court. See **Hiigel**, 190 Colo. at 63, 544 P.2d at 987. Under this theory of strict liability, the plaintiff's comparative negligence was not a defense to either strict liability claims, see **Uptain v. Huntington Lab, Inc.**, 723 P.2d 1322 (Colo. 1987), or to those for breach of warranty. **Zertuche v. Montgomery Ward & Co.**, 706 P.2d 424 (Colo. App. 1985). Because strict liability was not based on fault, simple negligence was viewed as insufficient to constitute a defense. **Jackson v. Harsco Corp.**, 673 P.2d 363 (Colo. 1983). Also, privity was not a restriction to the imposition of liability, as the Colorado courts invoked the doctrine of strict liability as to bystanders as well as product buyers, see **Bradford**, 33 Colo. App. at 108, 517 P.2d at 411-12 (allowing non-buyer, non-consumer plaintiff to recover). The instruction endorsed by the supreme court has adopted the same language as is found in the UCC, to permit recovery by any person "who may reasonably be expected to use, consume, or be affected" by the product. § 4-2-318, C.R.S.; Instruction 14:1 (elements of liability), ¶ 8. Finally, plaintiffs were also allowed to proceed against anyone in the chain of distribution, from the manufacturer to the retail seller. **Prutch v. Ford Motor Co.**, 618 P.2d 657 (Colo. 1980); RESTATEMENT § 402A.

4. In 1977, the General Assembly enacted the Product Liability Act. See §§ 13-21-401 to -406, C.R.S. The Act, *inter alia*, defined "manufacturer," § 13-21-401(1), C.R.S.; see Instruction 14:2; Notes on Use to Instruction 14:1, and generally allowed a plaintiff to sue only a "manufacturer" for strict liability rather than every seller in the chain of distribution. § 13-21-402, C.R.S.; see Instructions 14:1 & 14:2 and their Notes on Use. The Act also included presumptions and rules of evidence that offer some additional protection to manufacturers. §§ 13-21-403, -404, C.R.S.; see Instructions 14:5, 14:5A, 14:5B, & 14:6.

5. The limitation in section 13-21-402(1), was broadened by the legislature in 2003, when the provision was amended to preclude any product liability action, regardless of the theory, against a product seller unless that seller is also the manufacturer of the product or component part that is the subject of the action. See **Carter v. Brighton Ford, Inc.**, 251 P.3d 1179 (Colo. App. 2010). Presumably, that "qualified immunity" for sellers and distributors will continue to be an affirmative statutory defense that will be considered waived unless it is raised in the defendant's responsive pleading or answer. **Stone's Farm Supply, Inc. v. Deacon**, 805 P.2d 1109 (Colo. 1991).

6. In 1981, the Colorado Legislature added a comparative fault provision to the Product Liability Act that applies in any

product liability action, as defined in section 13-21-401(2). *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993); *States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990). The comparative negligence statute, § 13-21-111, does not apply in any “product liability action,” including those based on negligence. *See* § 13-21-406(4), C.R.S. Under section 13-21-406(1), comparative fault is an affirmative defense that, while it does not bar relief, will reduce a plaintiff’s recoverable damages. Initially, those cases that applied the statute seemed reluctant to reduce a plaintiff’s recovery by any degree of negligence. *See Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992); *States*, 799 P.2d at 430. However, more recent cases have applied the comparative fault provision to require reduction of a plaintiff’s recovery by any comparative fault, including negligence. *Miller*, 870 P.2d at 565-66; *see* Instruction 14:29 (comparative fault based on negligence). *See also Huffman v. Caterpillar Tractor Co.*, 908 F.2d 1470 (10th Cir. 1990) (applying Colorado law); *accord Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir. 1996). Whenever comparative fault is a submitted issue, the jury must return special verdicts. § 13-21-406(2); *see* Instructions 14:30 to 14:33.

7. In 2003, the Legislature codified “product misuse” in section 13-21-402.5, C.R.S. This statute applies to all product liability claims regardless of the theory. The statute provides that a product liability claim may not be commenced or maintained if, at the time the injury, death, or property damage occurred, the product was being used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse was a cause of the injury, death, or property damage. *Id.* This statute may present an issue as to whether the Legislature intended to eliminate the affirmative defense of misuse and instead require that the plaintiff prove, as an element of liability, that misuse was not a cause of the plaintiff’s injuries, damages, or losses. The Committee takes no position on this issue. However, counsel and the trial court should be aware of this issue when the evidence is sufficient to warrant instructing the jury on the issue of misuse. *See* Instruction 14:27.

8. Current Colorado case law holds that whether or not the product is defective, the plaintiff cannot recover and the manufacturer or seller is not liable if the plaintiff’s own misuse, rather than a product defect, is the cause of plaintiff’s injuries, damages, or losses. *Kysor Indus. Corp. v. Frazier*, 642 P.2d 908 (Colo. 1982) (plaintiff cannot rely on RESTATEMENT § 402A to recover when his own misuse causes the injury); *Shultz v. Linden-Alimak, Inc.*, 734 P.2d 146 (Colo. App. 1986) (where user with full knowledge of dangers inherent in his own misuse



of a product creates a dangerous condition in the product that injures him, there is no factual basis for submitting case to the jury).

9. Several Colorado cases have discussed misuse as a causation concept. *See, e.g., Uptain*, 723 P.2d at 1325 (misuse is a question of causation and a manufacturer is not liable if an unforeseeable misuse of the product caused the injuries); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (misuse is a causation concept which excuses the seller of a defective product from liability where misuse and not a defect caused the injury).

10. In **American Safety Equipment Corp. v. Winkler**, 640 P.2d 216 (1982), the Colorado Supreme Court approved adoption of section 402B of the RESTATEMENT (SECOND) OF TORTS. *See* Instructions 14:22 to 14:24. Section 402B allows recovery under a theory of strict liability for a seller's misrepresentation of a product, but there is no requirement that the product be defective or unreasonably dangerous. Although strict liability for misrepresentation remains a viable claim, no cases other than **American Safety Equipment** have been reported in the Colorado appellate courts. If a plaintiff is claiming damages for negligent misrepresentation during the course of the sale of a product under section 552 of the RESTATEMENT (SECOND) OF TORTS (1965), then the appropriate instructions will be found in Chapter 9. *See* Instruction 9:4; **Keller v. A.O. Smith Harvestore Prods., Inc.**, 819 P.2d 69 (Colo. 1991).

11. Any product liability action may include alternative claims for strict liability, negligence, and breach of warranty, with separate claims or with the possibility of separate claims for breach of express warranty (Instruction 14:8), breach of implied warranty of merchantability (Instruction 14:10), and breach of implied warranty of fitness for a particular purpose (Instruction 14:13). If a plaintiff is claiming the same damages for the same injuries under more than one claim for relief, then Instruction 6:14 must also be given.

12. Under section 13-22-104(2), C.R.S., an action for breach of warranty or in tort for sale of a defective product is precluded against those involved in blood transfusions or transplantations of human organs. Liability must be based on "negligence or willful misconduct." *See United Blood Servs. v. Quintana*, 827 P.2d 509 (Colo. 1992). Prior to the enactment of the statute, the supreme court had held that providing a blood transfusion by a hospital was not a sale for purposes of strict liability in tort or contract, **St. Luke's Hosp. v. Schmaltz**, 188 Colo. 353, 534 P.2d



781 (1975), but the selling of blood to a hospital by a blood bank was. **Belle Bonfils Mem'l Blood Bank v. Hansen**, 195 Colo. 529, 579 P.2d 1158 (1978).

13. For modifications in the instructions that may be required in any product liability action for damages against "the manufacturer, distributor, importer, or seller of firearms or ammunition alleging a defect in the design or manufacture of a firearm or ammunition," see sections 13-21-501 to -505, C.R.S. See also **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988) (holding that prior to statute, a .22-caliber rifle, as such, was not defective under "consumer expectations" or "risk-benefit" test), *overruled on other grounds by Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992).

14. Two federal statutes that may be relevant in certain product liability cases are the Consumer Product Warranties Act (Magnuson-Moss Act), 15 U.S.C. §§ 2301-2312 (2012), and the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089 (2012).

**A. STRICT PRODUCT LIABILITY****14:1 ELEMENTS OF LIABILITY**

**For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) (its) claim of sale of a defective product, you must find all of the following have been proved by a preponderance of the evidence:**

- 1. The defendant was a manufacturer of the *(description of product or component part of product)*;**
- 2. The defendant was engaged in the business of selling such *(description of product or component part)* for resale, use or consumption;**
- 3. The defendant sold the *(description of product or component part)*;**
- 4. The *(description of product or component part)* was defective and, because of the defect, the *(description of product or component part)* was unreasonably dangerous (to a person) (or) (to the property of a person) who might reasonably be expected to use, consume, or be affected by the *(description of product or component part)*;**
- 5. The *(description of product or component part)* was defective at the time it was sold by the defendant or left (his) (her) (its) control;**
- 6. The *(description of product or component part)* was expected to reach the user or consumer without substantial change in the condition in which it was sold;**
- 7. The *(description of product or component part)* did reach the user or consumer without substantial change in the condition in which it was sold;**
- 8. The plaintiff was a person who would reasonably be expected to use, consume or be affected by the *(description of product or component part)*;**

**9. The plaintiff had (injuries) (damages) (losses); and**

**10. The defect in the (description of product or component part) was a cause of the plaintiff's (injuries) (damages) (losses).**

**If you find that any one or more of these (number) statements has not been proved, then your verdict (on this claim) must be for the defendant.**

**On the other hand, if you find that all of these (number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim]).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute. **Koehn v. R.D. Werner Co.**, 809 P.2d 1045, 1050 (Colo. App. 1990) (“[A]n elemental instruction should not be so cast as to require proof of elements that are admitted or uncontroverted.”).

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the



actual damages instruction appropriate to the claim and the evidence in the case. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (seat-belt defense, § 42-4-237(7), C.R.S., applies in product liability action only to mitigate pain and suffering damages and may not be used in support of a comparative fault defense).

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly put in issue that would bar the plaintiff's entire claim—for example, release—additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. Under section 13-21-402(1), C.R.S., “[n]o product liability action shall be commenced or maintained against any seller of a product unless said seller is also the manufacturer of said product or . . . the part thereof giving rise to the product liability action.” However, as defined in section 13-21-401(1), C.R.S., the term “manufacturer” includes other sellers who are not manufacturers in the usual sense. *See also Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010); *Miller*, 870 P.2d at 563-64 (quoting statute).

6. Section 13-21-401(1) provides as follows:

“Manufacturer” means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product prior to the sale of the product to a user or consumer. The term includes any seller who has actual knowledge of a defect in a product or a seller of a product who creates and furnishes a manufacturer with specifications relevant to the alleged defect for producing the product or who otherwise exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into his possession and before it is sold to the ultimate user or consumer. The term also includes any seller of a product who is owned in whole or significant part by the manufacturer or who owns, in whole or significant part, the manufacturer. A seller not otherwise a manufacturer shall not be deemed to be a manufacturer merely because he places or has placed a private label on a product if he did not otherwise specify how the product shall be produced or control, in some significant manner, the manufacturing process of the product and the seller discloses who the actual manufacturer is.

7. In addition, under section 13-21-402(2):

If jurisdiction cannot be obtained over a particular manufac-

turer of a product or a part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed, for the purposes of this section, the manufacturer of the product.

8. Based on these statutes and the evidence in the case, an appropriate instruction defining "manufacturer" must be given with this instruction, or this instruction must be modified to include appropriate language from these statutes defining a "manufacturer." See **Stone's Farm Supply, Inc. v. Deacon**, 805 P.2d 1109, 1113-14 (Colo. 1991) (qualified immunity for sellers and distributors under section 13-21-402 is affirmative statutory defense that must be raised in defendant's responsive pleading or answer, or it is waived); **Miller**, 870 P.2d at 564 (approving instruction defining "manufacturer" as "a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or a component of a product prior to the sale of the product to a user or consumer. The term also includes any seller who alters or modifies a product in any significant manner after the product comes into [the seller's] possession and before it is sold to the ultimate user or consumer"); see also **Halter v. Waco Scaffolding & Equip. Co.**, 797 P.2d 790 (Colo. App. 1990) (distributor not deemed "manufacturer" under section 13-21-402(2), on basis of plaintiff's inability to learn name and address of manufacturer until after statute of limitations had run). But see **Carter**, 251 P.3d at 1182-83 (where plaintiff essentially seeks damages only concerning the product itself, because the product is not as warranted, that is a contract claim and not a "product liability action").

9. A product liability action may be available against a "manufacturer" who leases, rather than sells, a defective product. See § 13-21-401(3) (definition of "seller"). In such a case this instruction must be appropriately modified.

10. Other appropriate instructions defining the terms and phrases used in this instruction, for example, Instruction 14:3, defining "defective" and "unreasonably dangerous," and the applicable instructions relating to causation from Chapter 9 must also be given with this instruction. See **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992) (in design defect case, jury should be specifically instructed regarding the meaning of "defective"). Such other instructions in this Part A as are appropriate to the evidence in the case should be given as well.

11. This instruction, with appropriate modifications, may be used if a defendant is claiming that a nonparty manufacturer or a seller that may be deemed to be a "manufacturer" is strictly liable for all or part of the plaintiff's claimed damages. The modified instruction should reflect that the defendant designating the nonparty, and not the plaintiff, has the burden of proving the elements of such a claim. **Barton**, 938 P.2d at 537.

12. In some cases, for example products sold in bulk, the plaintiff's



evidence concerning whether the product was defective at the time it left the defendant's control will be sufficient, even though the product may have passed through the hands of others, if the evidence shows (a) the product was defective at the time the plaintiff purchased it or it proved to be defective within a reasonable time after it was purchased, and (b) the defect, if it was to occur at all, was of the kind that was likely to occur prior to the plaintiff's purchase and as part of the manufacturing or distribution processes. **Blueflame Gas, Inc. v. Van Hoose**, 679 P.2d 579 (Colo. 1984); **Prutch v. Ford Motor Co.**, 618 P.2d 657 (Colo. 1980); *see also* **Thirsk v. Ethicon, Inc.**, 687 P.2d 1315, 1317 (Colo. App. 1983) ("[I]f . . . the defendant presents any evidence that the product was not defective when it left the defendant's control, the jury must be instructed that the defendant cannot be held liable if the defendant has proved, by a preponderance of the evidence, that the product was not defective when it left the defendant's control."). In such cases, this instruction must be appropriately modified (particularly numbered paragraph 5, as well, possibly, as numbered paragraphs 6 and 7), and other instructions based on these rules should be given, as may be necessary.

13. For purposes of imposing strict liability in tort for a defective product, electricity is not a product that has been "sold" or put "in the stream of commerce," at least not until it reaches the point where it has been made available for use by a consumer. **Smith v. Home Light & Power Co.**, 734 P.2d 1051 (Colo. 1987). For possible liability in negligence in the distribution or transmission of electricity, *see* Instruction 9:7 (inherently dangerous activities).

### Source and Authority

1. This instruction is supported by the Colorado statutes set out above and on RESTATEMENT (SECOND) OF TORTS § 402A (1965), as adopted and elaborated by the Colorado Supreme Court in both **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975), and **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978). *See also* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997) (specifically supporting elements in numbered paragraphs 1, 2, 3, and 6); **Armentrout**, 842 P.2d at 186 (specifically supporting numbered paragraph 4); **Simon v. Coppola**, 876 P.2d 10 (Colo. App. 1993) (citing instruction and discussing principle in paragraph 7); **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993) (citing **Union Supply Co.** in context of elements for prima facie case against manufacturer of component parts or supplier of raw materials); **Shaw v. General Motors Corp.**, 727 P.2d 387 (Colo. App. 1986) (specifically supporting numbered paragraph 5); **Union Ins. Co. v. RCA Corp.**, 724 P.2d 80 (Colo. App. 1986) (sufficiency of circumstantial evidence to support finding of defect); **Littlejohn v. Stanley Structures, Inc.**, 688 P.2d 1130 (Colo. App. 1984) (citing this instruction); **Larson v. Clark Equip. Co.**, 33 Colo. App. 277, 518 P.2d 308 (1974) (warranty provisions of U.C.C. do not preclude judicial adoption of strict liability in tort under RESTATE-



MENT § 402A); **Bradford v. Bendix-Westinghouse Auto. Air Brake Co.**, 33 Colo. App. 99, 517 P.2d 406 (1973).

2. An action for strict liability in tort may be maintained by one who "foreseeably may be injured along the path of delivery" of a defective product. **Frazier v. Kysor Indus. Corp.**, 43 Colo. App. 287, 292, 607 P.2d 1296, 1301 (1979), *rev'd on other grounds*, 642 P.2d 908 (Colo. 1982).

3. A defendant may not rely on an exculpatory agreement purporting to release a manufacturer from a claim for strict product liability for personal injury because such releases are against public policy. **Boles v. Sun Ergoline, Inc.**, 223 P.3d 724 (Colo. 2010).

4. The doctrine of strict liability in tort may be used to recover damages for physical injury to the product itself caused by the defect, in addition to damages for physical injuries caused to persons or to other property by the defect. However, commercial or business losses attributable directly to the defect are not recoverable under the doctrine. **Hiigel**, 190 Colo. at 65, 544 P.2d at 989; **Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984). *But see Carter*, 251 P.3d at 1187 (noting that **Hiigel** must be read now in light of **Town of Alma v. AZCO Construction, Inc.**, 10 P.3d 1256 (Colo. 2000), and that "product liability actions" are actions in tort that seek recovery for injury and collateral damage caused by defective products).

5. As to the applicability of the doctrine to manufacturers of component parts that prove to be defective, see **Union Supply Co.**, 196 Colo. at 170-71, 583 P.2d at 281-82; **Hiigel**, 190 Colo. at 65, 544 P.2d at 989; **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993); and **Bond**, 868 P.2d at 1118-19. *See also Miller*, 870 P.2d at 565 (component parts could constitute "product" that seller had prepared for sale to consumer); **Shaw**, 727 P.2d at 389.

6. As to the potential liability of a successor corporation, see **Ruiz v. ExCello Corp.**, 653 P.2d 415, 417 (Colo. App. 1982) (nothing in legislative history of Product Liability Act, §§ 13-21-401 to -406, C.R.S., "indicates a legislative intent to abrogate the corporate rule of successor liability as applied to [the successor of] a manufacturer"). *See also Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141 (Colo. App. 1992) (rejecting "product line" and "continuity of enterprise" exceptions to traditional rule of nonliability of successor corporations in products liability action).

**14:2 MANUFACTURER—DEFINED**

**“Manufacturer” means:**

(1. A person or entity who designs, assembles, makes, produces, constructs or otherwise prepares [a product] [or] [a component part of a product] prior to the sale of the product to a user or consumer;)

(2. A seller who has knowledge of a defect in a product;)

(3. A seller who creates and furnishes a manufacturer with specifications for a product that are related to the alleged defect [whether or not the seller placed a private label on the product];)

(4. A seller who exercises some significant control over all or a portion of the manufacturing process or who alters or modifies a product in any significant manner after the product comes into [his] [her] [its] possession and before it is sold to the ultimate user or consumer [whether or not the seller placed a private label on the product];)

(5. A seller who placed a private label on the product and did not disclose who the actual manufacturer is).

**Notes on Use**

1. This instruction is to be given whenever there is a factual dispute that prevents the trial court from determining as a matter of law that a defendant or a designated nonparty is a “manufacturer,” as that term is defined in section 13-21-401(1), C.R.S. This instruction must be given whenever numbered paragraph 1 to Instruction 14:1 (elements of liability) is given.

2. Use whichever parenthesized paragraphs are most appropriate and omit any words or phrases that are undisputed or that do not apply to the facts at issue. Another definition of “manufacturer” set out in section 13-21-401(1) has been omitted from this instruction because it will seldom involve a factual dispute and should be decided by the court as a matter of law. That omitted language states that a manufacturer “also

includes any seller of a product who is owned in whole or in significant part by the manufacturer or who owns, in whole or significant part, the manufacturer." Also, under section 13-21-402(2), C.R.S., "[i]f jurisdiction cannot be obtained over a particular manufacturer . . . that manufacturer's principal distributor or seller over whom jurisdiction can be obtained shall be deemed . . . the manufacturer of the product."

### Source and Authority

1. This instruction is supported by section 13-21-401(1), and **Miller v. Solaglas California, Inc.**, 870 P.2d 559 (Colo. App. 1993) (approving instruction that conformed to a portion of the definition set forth in statute).

2. It is important to determine whether a defendant is a "manufacturer," as that term is defined in § 13-21-401(1), because only a manufacturer can be held liable in a product liability action. § 13-21-402(1).



### 14:3 DEFECTIVE, UNREASONABLY DANGEROUS— DEFINED

(A product is unreasonably dangerous because of a defect in its manufacture if it creates a risk of harm to persons or property that would not ordinarily be expected.)

(A product is unreasonably dangerous because of a defect in its design if it creates a risk of harm to persons or property that is not outweighed by the benefits to be achieved from such design.)

(A product is defective in its design, even if it is manufactured and performs exactly as intended, if any aspect of its design makes the product unreasonably dangerous.)

#### Notes on Use

1. Use whichever parenthesized sentences are appropriate in light of the evidence in the case.

2. This instruction should be used whenever a claimed defect involves a matter relating to the manufacture or design of the product, as opposed to a claimed defect that relates only to the adequacy of warnings or instructions dealing with the use of the product. When the claimed defect relates only to the adequacy of warnings or instructions as to its use, Instruction 14:4 should be used rather than this instruction. When there is a claimed defect relating to manufacture or design as well as a claimed defect relating to warnings or instructions, both this instruction and Instruction 14:4 should be given. The first paragraph of this instruction should be used only if the case involves an alleged manufacturing defect. The second and third paragraphs of this instruction should be used only if the case involves an alleged design defect. See **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992).

3. The “risk-benefit test,” and not the “consumer expectation test,” is the proper test to use in assessing “whether a product is unreasonably dangerous due to a design defect where the dangerousness of the design is ‘defined primarily by technical, scientific information.’” **Walker v. Ford Motor Co.**, 2017 CO 102, ¶ 2, 406 P.3d 845, 847 (quoting **Ortho Pharm. Corp. v. Heath**, 722 P.2d 410, 415 (Colo. 1986), *overruled on other grounds* by **Armentrout**, 842 P.2d at 183). In so holding, the supreme court implicitly disagreed with **Biosera, Inc. v. Forma Scientific, Inc.**, 941 P.2d 284 (Colo. App. 1996), *aff’d on other grounds*, 960

P.2d 108 (Colo. 1998), concluding that the “risk-benefit” test and the “consumer expectation” test are not mutually exclusive, and, therefore, in an appropriate case, there is no error in giving the jury an instruction that reflects both of these tests.

4. The “risk-benefit” test in the second paragraph must also be given in any case involving a prescription drug when the drug is claimed to be unsafe because of its design, though it was produced “in precisely the manner intended.” **Ortho Pharm. Corp.**, 722 P.2d at 415; *see also* **Barton v. Adams Rental, Inc.**, 938 P.2d 532, 537 & n.7 (Colo. 1997) (also citing seven factors identified in **Ortho** and noting that the existence of a “feasible design alternative” may be another factor in the analysis). As to when the “risk-benefit” test may be appropriate in cases involving other products, compare **Ortho** with **Camacho v. Honda Motor Co.**, 741 P.2d 1240 (Colo. 1987), and **White v. Caterpillar, Inc.**, 867 P.2d 100, 105 (Colo. App. 1993) (risk-benefit test “has been applied in cases involving products that are complex and largely beyond the knowledge and experience of the ordinary consumer”). As to the factors that are relevant under the “risk-benefit” test and, therefore, appropriate for determining the relevance of evidence and argument of counsel, *see* **Armentrout**, 842 P.2d at 184 and n.10 (citing **Ortho**, 722 P.2d at 414, and listing additional factors that may be considered). The court noted that the existence of a feasible design alternative is a factor in the “risk-benefit” analysis, but “not always necessary” to establish a design defect claim. **Armentrout**, 842 P.2d at 185 n.11. *See also* **Fibre-board Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993) (“risk-benefit” test requires flexibility in deciding which factors should apply to facts of case).

5. If more appropriate to the evidence in the case, substitute any one or more of the following for the word “manufacture”: construction, installation, preparation, assembly, testing, or packaging. If appropriate, a more suitable word may be substituted for “design,” such as, “formulation.” For other possible language, *see* section 13-21-401(2), C.R.S.

### Source and Authority

1. *See* Source and Authority to Instruction 14:1, in particular, RESTATEMENT (SECOND) OF TORTS § 402A cmts. g, h, i, and k (1965).

2. The first sentence is supported by **Hiigel v. General Motors Corp.**, 34 Colo. App. 145, 525 P.2d 1198 (1974), *rev'd on other grounds*, 190 Colo. 57, 544 P.2d 983 (1975); and **Littlejohn v. Stanley Structures, Inc.**, 688 P.2d 1130 (Colo. App. 1984) (citing previous version of this instruction).

3. For strict liability in tort, the product must be defective and the defect must render the product unreasonably dangerous. *See* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997); **Armentrout**, 842 P.2d at 183; **White**, 867 P.2d at 105 (recognizing both “consumer expecta-

tion” and “risk-benefit” tests); **Potthoff v. Alms**, 41 Colo. App. 51, 583 P.2d 309 (1978); *see also* **Hilberg v. F.W. Woolworth Co.**, 761 P.2d 236 (Colo. App. 1988) (.22-caliber rifle, as such, not defective under “consumer expectations” or “risk-benefit” test), *overruled on other grounds by* **Casebolt v. Cowan**, 829 P.2d 352 (Colo. 1992).

4. A product, including one used as a component part, may be defective and unreasonably dangerous because of its design. *See* **Walker**, 2017 CO 102, ¶ 2; **Armentrout**, 842 P.2d at 187; **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978); **White**, 867 P.2d at 105; **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993); **Shaw v. General Motors Corp.**, 727 P.2d 387 (Colo. App. 1986).

5. Liability may be imposed for additional injuries caused by a design defect even though the defect did not cause the initial accident, such as, the “second-collision” or “crashworthiness” case. *See* **Camacho v. Honda Motor Co.**, 741 P.2d 1240 (Colo. 1987) (applying concept to motorcycles); **Roberts v. May**, 41 Colo. App. 82, 583 P.2d 305 (1978).

6. A product may be defective in design and unreasonably dangerous if it fails to meet the “ordinary consumer expectation” test or the “risk-benefit” test. *See* **Armentrout**, 842 P.2d at 183; **Camacho**, 741 P.2d at 1247-48; **Ortho Pharm. Corp.**, 722 P.2d at 413-14. Also, it may be defective and unreasonably dangerous even though the risk of harm is open and obvious. **Armentrout**, 842 P.2d at 181 (citing **Camacho** and **Union Supply Co.**); **White**, 867 P.2d at 107. *But cf.* **Kern v. General Motors Corp.**, 724 P.2d 1365 (Colo. App. 1986) (failure to equip passenger car with “passive restraint” system did not render vehicle defective and unreasonably dangerous); **Davis v. Caterpillar Tractor Co.**, 719 P.2d 324, 326-27 (Colo. App. 1986) (product not “unreasonably dangerous” when “consumer deliberately chooses to purchase that which he, as a reasonable consumer, should have expected was not as safe as other products on the market”).



## 14:4 WARNINGS AND INSTRUCTIONS

(A product is) (A product not otherwise defective in its manufacture or design becomes) defective and unreasonably dangerous if adequate (warnings) (or) (instructions for use) are not provided. To be adequate, the (warnings) (or) (instructions for use) must inform the ordinary user of any specific risk of harm that may be involved in (any intended or reasonably expected use) (or) (any failure to properly follow instructions when using the product for any intended or reasonably expected use).

However, if a specific risk of harm would be apparent to an ordinary (buyer) (user) (consumer) from the product itself, (a warning of) (or) (instructions concerning) that specific risk of harm (is) (are) not required.

### Notes on Use

1. This instruction should be given whenever a claimed defect involves the lack or adequacy of warnings or instructions for the use of the product. The first parenthetical clause in the first sentence should be used when the only defect claimed in the product is the inadequacy of warnings or instructions. The second parenthetical clause should be used when the claimed defect also involves, or another claimed defect involves, manufacture or design. See Note 1 of Notes on Use to Instruction 14:3.

2. Use whichever other parenthesized words are appropriate. In certain cases, this instruction may need to be modified to clarify that the adequacy of warnings or instructions is to be tested in terms of the persons or groups of persons to whom the warnings and instructions are normally expected to be addressed. For example, warnings and instructions dealing with risks involved with the installation or use of medical devices or the side effects of prescription drugs will normally be addressed to physicians and pharmacists, rather than to the ultimate consumer. See, e.g., **O'Connell v. Biomet, Inc.**, 250 P.3d 1278 (Colo. App. 2010); **Peterson v. Parke Davis & Co.**, 705 P.2d 1001 (Colo. App. 1985); **Hamilton v. Hardy**, 37 Colo. App. 375, 549 P.2d 1099 (1976), *overruled on other grounds by State Bd. of Med. Exam'rs v. McCroskey*, 880 P.2d 1188 (Colo. 1994).

3. Even though a risk may be "open and obvious," a product may nonetheless be defective for lack of an adequate warning, for example,

that an option is available for use with, or as part of, the product that would make it safer. **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992) (if a danger is open and obvious, there is no duty to warn unless there is a substantial likelihood that proposed warning would have prevented injury to ordinary user); **Camacho v. Honda Motor Co.**, 741 P.2d 1240 (Colo. 1987) (citing **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978)); *see also* **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (citing instruction and following **Armentrout**). In these cases, appropriate modifications may be required in the second paragraph of this instruction. **Armentrout**, 842 P.2d at 181.

4. In appropriate cases, Instruction 14:6 regarding “state-of-the-art” products should also be given with this instruction. *See* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997); **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993).

### Source and Authority

This instruction is supported by section 13-21-401(2), C.R.S.; **Barton**, 938 P.2d at 537; **Fibreboard Corp.**, 845 P.2d at 1173-74; **Armentrout**, 842 P.2d at 180-81; **Anderson v. M.W. Kellogg Co.**, 766 P.2d 637 (Colo. 1988); **Uptain v. Huntington Lab, Inc.**, 723 P.2d 1322 (Colo. 1986) (adequacy of warning of risk arising from unintended, but foreseeable, use of unavoidably unsafe product); **Anderson v. Heron Engineering Co.**, 198 Colo. 391, 604 P.2d 674 (1979) (concerning adequacy of warnings and instructions to maintenance personnel); **Union Supply Co.**, 196 Colo. at 173, 583 P.2d at 283; **Hiigel v. General Motors Corp.**, 190 Colo. 57, 64, 544 P.2d 983, 988 (1975) (“[T]he duty to warn may not be satisfied by directions which merely tell how to use the product, but say nothing about the inherent and specific dangers if directions are not followed.”); **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (component-part manufacturer was not entitled to jury instruction that it had no duty to foresee or warn of all dangers that may result from use of final product); **White**, 867 P.2d at 105 (supporting second paragraph and following **Armentrout**); **Davis v. Caterpillar Tractor Co.**, 719 P.2d 324 (Colo. App. 1985) (supporting second paragraph); **Downing v. Overhead Door Corp.**, 707 P.2d 1027 (Colo. App. 1985) (product may be defective because of failure to provide adequate installation instructions for its safe use); **Bailey v. Montgomery Ward & Co.**, 690 P.2d 1280, 1282 (Colo. App. 1984) (“failure to warn through adequate directions or instructions may itself constitute a product defect”); **Martinez v. Atlas Bolt & Screw Co.**, 636 P.2d 1287 (Colo. App. 1981); **Frazier v. Kysor Industrial Corp.**, 43 Colo. App. 287, 607 P.2d 1296 (1979) (in case involving adequacy of instructions for moving heavy equipment, product not defective when plaintiff’s injuries were caused by dangerous condition created solely by plaintiff’s own mishandling or misuse rather than by lack or inadequacy of warnings or instructions), *rev’d on other grounds*, 642 P.2d 908 (Colo. 1982); **Potthoff v. Alms**, 41 Colo. App. 51, 583 P.2d 309 (1978); and **Bookout v. Victor Comptometer Corp.**, 40

Colo. App. 417, 576 P.2d 197 (1978). See also **Campbell v. Burt Toyota-Diahsu, Inc.**, 983 P.2d 95 (Colo. App. 1998) (where warning is given, it is assumed it will be read and heeded, citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (1965)); RESTATEMENT § 402A cmt. j.



## 14:5 PRESUMPTIONS—NONCOMPLIANCE WITH GOVERNMENTAL STANDARDS

**“Presumptions” are legal rules based on experience or public policy. They are established in the law to assist the jury in ascertaining the truth.**

**In this case, if you find that at the time** (*name of defendant if a “manufacturer”*) (*name of “manufacturer” if other than defendant*) **sold** (*description of product*), **(1) the product did not comply with any applicable code, standard, or regulation of the United States or the State of Colorado or any of their agencies, and (2) that the lack of compliance was a cause of the plaintiff’s claimed (injuries) (damages) (losses), then the law presumes that** (*the [description of product] was defective*) (*the [name of defendant] was negligent*) (*the [description of product] did not comply with any warranty of [insert description]*).

**You must consider this presumption together with all the other evidence in the case in deciding whether** (*the [description of product] was defective*) (*the [name of defendant] was negligent*) (*the [description of product] complied with any warranty of [insert description]*).

### Notes on Use

1. When otherwise applicable, this instruction should be used rather than Instruction 3:5 (permissible inference arising from rebuttable presumption).

2. Use whichever bracketed or parenthesized portions of this instruction are appropriate in light of plaintiff’s theory or theories of relief and the evidence in the case.

3. This instruction must be given if the court determines by a preponderance of the evidence that the evidence has established the necessary facts giving rise to the presumption. § 13-21-403(4), C.R.S.; see **Downing v. Overhead Door Corp.**, 707 P.2d 1027 (Colo. App. 1985); see also **Patterson v. Magna Am. Corp.**, 754 P.2d 1385 (Colo. App. 1988). But see **Mile Hi Concrete, Inc. v. Matz**, 842 P.2d 198 (Colo. 1992). In **Mile Hi Concrete**, the supreme court held that the

presumption in section 13-21-403(3), was rebuttable; that is, when a plaintiff introduces evidence to counter the presumption, it is error to instruct the jury concerning the presumption. However, section 13-21-403 was amended in 2003, and now requires a court to inform the jury of the presumptions stated in section 13-21-403 when facts giving rise to the presumption have been established. *See* § 13-21-403(4). This amendment effectively overrules **Mile Hi Concrete** as it relates to jury instructions based on the statutory presumptions in section 13-21-403. Nonetheless, since the presumption relates to compliance or noncompliance with any code, standard, or regulation, the instruction should be given only when that code, standard, or regulation specifically relates to the claimed defect. If the code, standard, or regulation is of a general nature and does not deal with the specific nature of the claimed defect, this instruction should not be given.

4. If there is sufficient evidence of the basic facts on which the presumption stated in this instruction is based, then this instruction is applicable in any case where damages for injury, death, or property damage are claimed to have been the result of breach of warranty, strict liability in tort, or the manufacturer's or seller's negligence. § 13-21-403(1); *see also* § 13-21-401(2), C.R.S. (defining "product liability action"). This instruction does not apply to warranty claims where the plaintiff is seeking contract (i.e., commercial) damages, rather than damages for physical injuries to persons or property caused by the breach.

5. Regarding the Product Liability Act's presumptions of nondefectiveness, *see* Instructions 14:5A (compliance with governmental standards) and 14:5B (first sale of product ten years or more before claimed injury).

6. If there is a dispute as to whether the defendant was a "manufacturer," or, if not the defendant, whether the person claimed to be the "manufacturer" was a manufacturer within the meaning of section 13-21-401(1), or section 13-21-402(2), C.R.S. (quoted in Notes on Use to Instruction 14:1), then an appropriate instruction based on the relevant portions of those statutes must be given.

7. Evidence of noncompliance may be given in the form of an opinion of a qualified expert and is sufficient to warrant the giving of this instruction. *See Uptain v. Huntington Lab, Inc.*, 685 P.2d 218 (Colo. App. 1984), *aff'd on other grounds*, 723 P.2d 1322 (Colo. 1986).

### Source and Authority

This instruction is supported by section 13-21-403(2), C.R.S.

## 14:5A PRESUMPTIONS—COMPLIANCE WITH GOVERNMENTAL STANDARDS

**“Presumptions” are legal rules based on experience or public policy. They are established in the law to assist the jury in determining the truth.**

**In this case, if you find that at the time (*name of defendant if a “manufacturer”*) (*name of “manufacturer” if other than defendant*) **sold** (*description of product*), (1) the product complied with any applicable code(s), standard(s) or regulation(s) of the United States or the State of Colorado or any of their agencies, then the law presumes that (the [*description of product*] was not defective) (the [*name of defendant*] was not negligent) (the [*description of product*] did not fail to comply with any warranty of [*insert description*]).**

**You must consider this presumption together with all the other evidence in the case in deciding whether (the [*description of product*] was defective) (the [*name of defendant*] was negligent) (the [*description of product*] complied with any warranty of [*insert description*]).**

### Notes on Use

1. Except for the last Note on Use, the Notes on Use to Instruction 14:5 are also applicable to this instruction.

2. Evidence of compliance may be given in the form of an opinion of a qualified expert and is sufficient to warrant the giving of this instruction. **Uptain v. Huntington Lab, Inc.**, 685 P.2d 218 (Colo. App. 1984), *aff’d on other grounds*, 723 P.2d 1322 (Colo. 1986).

### Source and Authority

This instruction is supported by section 13-21-403(1), C.R.S.



## 14:5B PRESUMPTIONS—TEN-YEAR USE OF PRODUCT

“Presumptions” are legal rules based on experience or public policy. They are established in the law to assist the jury in determining the truth.

In this case, if you find that the (*description of product*) was sold for the first time for use or consumption ten or more years before any claimed (injuries) (damages) (losses) were incurred by the plaintiff, then the law presumes that (the [*description of product*] [was not defective]) (the [*name of defendant*] was not negligent) (the [*description of product*] was in compliance with any warranty of [*insert description*]) (and) (all warnings and instructions were proper and adequate).

You must consider this presumption together with all the other evidence in the case in deciding whether (the [*description of product*] was defective) (the [*name of defendant*] was negligent) (the [*description of product*] complied with any warranty of [*insert description*]).

### Notes on Use

1. Except for the last Note on Use, the Notes on Use to Instruction 14:5 are also applicable to this instruction.

2. There is a split of authority in the court of appeals as to whether the ten-year period runs from the time when the specific product involved in the case was first sold, **Downing v. Overhead Door Corp.**, 707 P.2d 1027 (Colo. App. 1985), or from the time when the product line of the particular design that includes the product involved in the case was first sold to the public. **Patterson v. Magna Am. Corp.**, 754 P.2d 1385 (Colo. App. 1988). Depending on the evidence in the case and which interpretation the court determines to be more appropriate, this instruction may need to be appropriately modified.

### Source and Authority

This instruction is supported by section 13-21-403(3), C.R.S.

## 14:6 STATE-OF-THE-ART

A product is not defective and unreasonably dangerous if a particular risk was not known or knowable by the manufacturer in light of the generally recognized and prevailing scientific and technical knowledge available at the time of manufacture and distribution.

### Notes on Use

This instruction should be given in appropriate cases in strict liability if the plaintiff is claiming damages as a result of a failure to warn. See **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997); **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993).

### Source and Authority

This instruction is supported by **Fibreboard**, 845 P.2d at 1175.

## 14:7 DAMAGE ALONE NOT PROOF PRODUCT WAS DEFECTIVE OR UNREASONABLY DANGEROUS

The fact that (the plaintiff may have been injured) (the plaintiff's property may have been damaged), without more, does not establish that the product was defective or unreasonably dangerous.

### Notes on Use

Use whichever parenthesized clause is appropriate, in light of the evidence in the case.

### Source and Authority

This instruction is supported by **Kysor Indus. Corp. v. Frazier**, 642 P.2d 908 (Colo. 1982); **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986); **Kern v. General Motors Corp.**, 724 P.2d 1365 (Colo. App. 1986); and **Davis v. Caterpillar Tractor Co.**, 719 P.2d 324 (Colo. App. 1985). *See also* Source and Authority to Instruction 14:1.



**B. PRODUCT LIABILITY FOR BREACH OF WARRANTY****14:8 BREACH OF EXPRESS WARRANTY UNDER U.C.C.—ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* *(its)* claim of breach of express warranty, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant sold the *(insert description of article)*;
2. The defendant expressly warranted the *(description of article)* to *(insert express warranty claimed by the plaintiff)*;
3. The plaintiff is a person who was reasonably expected to use, consume or be affected by the *(description of article)*;
4. The *(description of article)* was not as warranted;
5. This breach of warranty caused the plaintiff *(injuries)* *(damages)* *(losses)*; and
6. Within a reasonable time after the plaintiff discovered or should have discovered the alleged breach of warranty, the plaintiff notified the defendant of such breach.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict *(on this claim)* must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, *(then your verdict must be for the plaintiff)* *(then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim])*.

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (the seat-belt defense, § 42-4-237(7), C.R.S., applies in product liability action only to mitigate noneconomic damages and may not be used in support of a comparative-fault defense).

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly put in issue that would bar the plaintiff's entire claim—for example, release—additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. Other appropriate instructions defining the terms and phrases used in this instruction, for example, Instruction 14:15, explaining what constitutes a reasonable time for the purpose of giving notice, must also be given with this instruction. In particular, the appropriate instruction or instructions relating to causation must be given. *See* Chapter 9.

6. This instruction has been prepared primarily for use in cases in which the plaintiff, as a remote user or consumer, is claiming tort-like damages for personal injuries or property damage under the provisions

of section 4-2-318, C.R.S. (quoted in the following paragraph), and section 4-2-715(2)(b), C.R.S. (allowing recovery for personal injuries and property damage proximately caused by a breach of warranty). *Cf. Carter v. Brighton Ford, Inc.*, 251 P.3d 1179 (Colo. App. 2010) (where plaintiff essentially seeks damages only concerning the product itself, because the product is not as warranted, that is a contract claim and not a “product liability action”). However, with appropriate modifications, this instruction may be used where the plaintiff, as a buyer, is claiming contract or tort-like damages for a breach of warranty against his or her immediate seller. The most significant difference between the claims of two such plaintiffs would appear to be whether the plaintiff must prove actual damages or injuries as a necessary element of the cause of action. When the plaintiff is suing under section 4-2-318, as a remote user or consumer, for example, as a third-party beneficiary, the language of that section appears to make the proof of actual damages a necessary element of the cause of action. On the other hand, if the plaintiff is suing as the immediate contracting party, such as a buyer suing his or her seller, then whether the plaintiff is claiming contract damages or tort-like damages for physical injuries or property damage, the action is clearly one in contract, and the usual contract rule would appear to be applicable: if the plaintiff fails to prove actual damages, the plaintiff should be entitled to recover, although recovery is limited to nominal damages. *See* 67A Am. Jur. 2d *Sales* § 1125 (2014). In such cases, the element of liability relating to the plaintiff being an expected user or consumer should be omitted, the phrase “to the plaintiff” should be added to the first numbered paragraph, and the element of liability relating to proof of physical injuries or damages should be omitted from this instruction. The requirement, however, that the plaintiff must prove actual damages in order to recover them should be set out in the damages instruction in a manner similar to other situations where a plaintiff may be entitled to recover at least nominal damages if the plaintiff fails to prove any actual damages. *See, e.g.*, Instruction 21:5.

7. If there is evidence that the requirement of notification has been met by someone other than the plaintiff, such as the buyer, this instruction should be appropriately modified. Also, the notification need not use the words “breach” or “warranty.” *See* § 4-2-607, cmts. 4 & 5, C.R.S. Consequently, when more appropriate, this paragraph may be rephrased to comport more nearly with the facts of the particular case, for example: “Within a reasonable time after he sustained any injuries or damages caused by the breach of warranty, the plaintiff notified or complained to the defendant of his injuries or damages.” Whatever the plaintiff claims to have done, must, of course, have been sufficient as a matter of law to constitute notification. *See* § 4-1-202, C.R.S.

### Source and Authority

1. This instruction is supported by sections 4-2-714 and 4-2-715, C.R.S., dealing with a buyer’s damages for breach of warranty.

2. The provisions of the Uniform Commercial Code relating to the



sale of goods apply to used as well as new goods. **Moore v. Burt Chevrolet, Inc.**, 39 Colo. App. 11, 563 P.2d 369 (1977).

3. Claims for product liability may be made only against sellers who are also "manufacturers" within the definition of sections 13-21-401(1) or 13-21-402, C.R.S. See **Carter**, 251 P.3d at 1181-82; **Miller**, 870 P.2d at 563-64. The qualified immunity for sellers and distributors under section 13-21-402 is an affirmative statutory defense that may be considered waived if it is not raised in the defendant's responsive pleading or answer. **Stone's Farm Supply, Inc. v. Deacon**, 805 P.2d 1109 (Colo. 1991).

4. For a plaintiff to recover damages for breach of warranty, it is not necessary that the plaintiff have been the buyer, because under section 4-2-318, "[a] seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume, or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section." However, some other exclusions or modifications of a warranty made between a seller and a buyer may be effective against a subsequent buyer, user, or affected person in an action by that person against that seller. See **Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.**, 797 P.2d 835 (Colo. App. 1990) (subsequent seller must make independent disclaimer to be protected from warranty liability). Compare **Wenner Petro. Corp. v. Mitsui & Co. (U.S.A.)**, 748 P.2d 356, 357 (Colo. App. 1987) ("properly executed limitations of warranties or available remedies are equally applicable to any one that would be a beneficiary of a seller's warranty"), with § 4-2-719(3), C.R.S. (recognizing validity of clauses that limit or exclude consequential damages). If there is a dispute as to whether the defendant "sold" the goods within the meaning of section 4-2-106(1), C.R.S., another instruction based on that section may be required.

5. Concerning the requirement that notice of the breach be given the seller within a reasonable time, see section 4-2-607(3), C.R.S., requiring the buyer, where a tender has been accepted, to give notice within a reasonable time or be barred from any remedy. For cases discussing the purposes of notice and its timeliness in a commercial setting, see **Cooley v. Big Horn Harvestore Systems, Inc.**, 813 P.2d 736 (Colo. 1991); and **White v. Mississippi Order Buyers, Inc.**, 648 P.2d 682 (Colo. App. 1982). As to the sufficiency of a notice in a commercial setting, see **Myers v. Koop**, 757 P.2d 162 (Colo. App. 1988); **International Technical Instruments, Inc. v. Engineering Measurements Co.**, 678 P.2d 558, 561 (Colo. App. 1983) ("Notice of breach is legally sufficient when it provides the seller with an opportunity to investigate the buyer's complaint, to correct the alleged defect, or to effect a settlement through negotiation."); and **Western Conference Resorts, Inc. v. Pease**, 668 P.2d 973 (Colo. App. 1983). For cases describing the same purposes, but involving damage claims for injury to persons or property, rather than for commercial damages,

see **Palmer v. A.H. Robins Co.**, 684 P.2d 187 (Colo. 1984) (injury to person), and **Prutch v. Ford Motor Co.**, 618 P.2d 657 (Colo. 1980) (injury to property). See also **Wallman v. Kelley**, 976 P.2d 330 (Colo. App. 1998) (in case involving injury to person, filing of lawsuit may provide sufficient notice).

6. Section 4-2-607(3) (the notice requirement), refers only to a “buyer” having to give notice. However, official comment 5 to that section suggests that some sort of notice should be given by an injured plaintiff, regardless of whether the plaintiff was a “buyer.” Official comment 5 states:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller’s breach of warranty. Such a beneficiary does not fall within the reason of the present section [§ 4-2-607(3)] in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

7. On the question whether a plaintiff must give notice when the plaintiff is suing a remote seller for physical injury to person or property, and the plaintiff was a buyer, the supreme court has held that this notice requirement is satisfied if the plaintiff-buyer gave the requisite notice to his or her immediate seller. **Palmer**, 684 P.2d at 206; **Prutch**, 618 P.2d at 661. The court of appeals has also held, though without discussion, that a plaintiff who is suing for personal injury damages as a third-party beneficiary under section 4-2-318, and not as a buyer, must still give notice of the breach. **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986); see also **Cooley**, 813 P.2d at 741-42 (notice to manufacturer of breach of warranty is not prerequisite to filing commercial litigation against manufacturer).

8. There may be other available statutory remedies relating to express warranties. See, e.g., §§ 42-10-101 to -107, C.R.S. (concerning sales of motor vehicles).

## 14:9 EXPRESS WARRANTY—DEFINED

(1) Express warranties by a seller are created as follows:

(a) Any promise or statement of fact made by the seller to the buyer about the goods that becomes part of the basis of the sale, creates an express warranty that the goods shall conform to the promise or statement.

(b) Any description of the goods that is made part of the basis of the sale creates an express warranty that the goods shall conform to the description.

(c) Any sample or model that is made part of the basis of the sale creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) To create an express warranty, it is not necessary for the seller to use formal words such as “warrant” or “guarantee” or for the seller to have a specific intention to make a warranty. However, a statement that is only about the value of the goods or that is only the seller’s opinion or endorsement of the goods does not create a warranty.

### Notes on Use

1. This instruction should be given in conjunction with Instruction 14:8.

2. Only those subparagraphs (a), (b), or (c) of numbered paragraph 1 should be used as are appropriate in light of the evidence in the case.

3. Section 4-2-316(1), C.R.S., provides: “Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 4-2-202), negation or limitation is inoperative to the extent that such construction is unreasonable.” See *O’Neil v. Int’l Harvester Co.*, 40 Colo. App. 369, 575 P.2d 862 (1978) (applying statute and concluding that factual issue existed regarding



application of warranty exclusion clause in contract where buyer alleged oral warranties before execution of written contract and conduct following sale that tended to show warranties were made). In appropriate cases, when the relevant rules of this section would be applicable, an instruction stating those rules should also be given with this instruction.

### Source and Authority

1. This instruction is supported by the provisions of section 4-2-313, C.R.S. See also **Palmer v. A.H. Robins Co.**, 684 P.2d 187, 208 (Colo. 1984) (discussing various statutory provisions relating to express warranties and noting that “[w]hether a particular statement constitutes an express warranty is generally an issue of fact”); **Shaw v. General Motors Corp.**, 727 P.2d 387, 391 (Colo. App. 1986) (statement of opinion will not constitute express warranty because statement must be an “affirmation of fact or promise”).

2. As to what constitutes “part of the basis of the sale” under (1)(a), (b), or (c) of this instruction, see **Anderson v. Heron Engineering Co.**, 198 Colo. 391, 604 P.2d 674 (1979).

## 14:10 BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY—ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of breach of implied warranty of merchantability, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant sold the (*insert description of article*);
2. The plaintiff is a person who was reasonably expected to use, consume or be affected by the product;
3. The defendant was a merchant with respect to the type of product involved;
4. The (*description of article*) was not of merchantable quality at the time of sale;
5. This breach of warranty caused the plaintiff (injuries) (damages) (losses); and
6. Within a reasonable time after the plaintiff discovered or should have discovered the alleged breach of warranty, the plaintiff notified the defendant of such breach.

If you find that any one or more of these (*number*) statements has not been proved, then your verdict (on this claim) must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. The Notes on Use to Instruction 14:8 are also applicable to this instruction and should be read and applied accordingly.

2. Whenever this instruction is given, Instruction 14:11 and the first paragraph of Instruction 14:16 should also be given. The remaining portion of Instruction 14:16 dealing with the exclusion or modification of implied warranties should only be given if applicable.

3. Unlike the implied warranty of fitness for a particular purpose, which may apply to a seller regardless of whether the seller is a merchant, the implied warranty of merchantability, including the implied warranty of fitness for ordinary purposes, is applicable only to sellers who are also merchants with respect to the kind of goods they sell. § 4-2-314, C.R.S. If necessary, an instruction defining “merchant,” based on section 4-2-104, C.R.S., should also be given. *Cf. Colo.-Kan. Grain Co. v. Reifschneider*, 817 P.2d 637 (Colo. App. 1991) (applying definition in section 4-2-104, C.R.S., to hold that farmer was “merchant”).

4. If a contract involves the sale of goods as well as the performance of some labor or service, for example, installation, then, before giving this instruction, the court must determine whether the primary purpose of the contract was one for the sale of goods rather than for services. *Persichini v. Brad Ragan, Inc.*, 735 P.2d 168 (Colo. 1987); *Bailey v. Montgomery Ward & Co.*, 690 P.2d 1280 (Colo. App. 1984); *see Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993). For the factors to be considered in making this determination, *see Colorado Carpet Installation, Inc. v. Palermo*, 668 P.2d 1384 (Colo. 1983), as summarized in *Bailey*, 690 P.2d at 1282.

#### Source and Authority

1. This instruction is supported by section 4-2-314, and the authorities cited and discussed in Notes on Use and Source and Authority to Instruction 14:8. *See also Shaw v. General Motors Corp.*, 727 P.2d 387 (Colo. App. 1986) (specifically supporting numbered paragraph 4).



2. For purposes of the implied warranty of merchantability under section 4-2-314(1), "the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale." See Instruction 14:12.

3. For a discussion of the differences between an implied warranty of fitness for a particular purpose (Instruction 14:13 and Instruction 14:14) and an implied warranty of fitness for ordinary purposes as a form of the implied warranty of merchantability (Instruction 14:11), see **Palmer v. A.H. Robins Co.**, 684 P.2d 187 (Colo. 1984). Both warranties may arise out of the same transaction and coexist. *Id.*; **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989), *rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991).

## 14:11 IMPLIED WARRANTY OF MERCHANTABILITY—DEFINED

Where a (*description of article*) is sold by a merchant who deals with that product, the law impliedly warrants to any person who is reasonably expected to use, consume or be affected by the product that it is merchantable. The warranty need not be expressed in any fashion, as it is implied by law from such sale.

To be merchantable, the (*description of article*) must have

(1. Been such as would pass without objection in the trade under the description provided for in the contract) (and)

(2. Been of fair average quality within the description provided for in the contract) (and)

(3. Been fit for the ordinary purposes for which such [*insert description of the article*] [is] [are] used) (and)

(4. Been within the variations permitted by the agreement, of uniform kind, quality, and quantity within each unit and among all units involved) (and)

(5. Been adequately contained, packaged, and labeled as the agreement may have required) (and)

(6. Conformed to the promises or statements of fact, if any, made on the container or label).

### Notes on Use

1. Use only those parenthesized or bracketed portions of this instruction as are appropriate.

2. This instruction should be given in conjunction with Instruction 14:10.

3. Under section 4-2-314(3), C.R.S., unless excluded or modified, "other implied warranties may arise from course of dealing or usage of

trade.” In such cases, this instruction should be appropriately modified. For the definitions of “course of dealing” and “the usage of trade,” see section 4-1-303(b)-(c), C.R.S. See **Winer’s Pumping Units v. Emerald Gas Operating Co.**, 936 P.2d 627 (Colo. App. 1997) (course of dealing is sequence of previous conduct between parties to a particular transaction that may fairly be regarded as establishing a common basis for understanding their expressions and other conduct (citing § 4-1-303(b) (formerly codified at § 4-1-205(1)))).

4. Numbered paragraph 2 is applicable only to fungible goods. See § 4-2-314(2)(b).

### Source and Authority

The reference in the first paragraph of this instruction to third-party beneficiaries is supported by section 4-2-318, C.R.S. The remaining portions of the first paragraph and the instruction set out the basic provisions of section 4-2-314. See also **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989), *rev’d on other grounds sub nom. Stone’s Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991).



## 14:12 IMPLIED WARRANTY OF WHOLESOMENESS OF FOOD—DEFINED

**When a** (*insert an appropriate description, e.g., “packer,” “retailer,” “grocer,” “wholesaler,” “restaurateur,” etc.*) **sells (food) (or) (drink) for human consumption, (he) (she) (it) warrants that the product is wholesome and fit for human consumption at the time of the sale. This warranty is implied by law and need not be expressed in any fashion.**

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction, when appropriate, should be used in conjunction with Instructions 14:10 and 14:11.
3. If there is a dispute as to the fact of whether a sale in fact was made, this instruction may need to be modified to make it clear that, in giving this instruction, the court is not impliedly expressing an opinion as to how that disputed fact should be resolved.

### Source and Authority

1. This instruction is supported by **Gonzales v. Safeway Stores, Inc.**, 147 Colo. 358, 363 P.2d 667 (1961) (citing other cases and the implied warranty of merchantability provisions of the Uniform Sales Act). In **Gonzales**, the court also held that this warranty applied to a retailer selling foodstuffs in sealed containers who was unaware of the lack of the ordinary fitness of the food.
2. Section 4-2-314(2)(c), C.R.S., also supports this instruction by providing that food is not merchantable if not “fit for the ordinary purposes” for which it is sold. Also under section 4-2-314(1), “the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.”
3. The burden is on the plaintiff to prove that the food was unwholesome at the time of sale. **Vanadium Corp. of Am. v. Wesco Stores Co.**, 135 Colo. 77, 308 P.2d 1011 (1957).

## **14:13 BREACH OF IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE—ELEMENTS OF LIABILITY**

**For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of breach of implied warranty of fitness for a particular purpose, you must find all of the following have been proved by a preponderance of the evidence:**

**1. The defendant sold the (*insert description of article*);**

**2. The defendant impliedly warranted the (*description of article*) to be (suitable) (fit) for the particular purpose of (*insert description of the particular purpose claimed by the plaintiff*);**

**3. The plaintiff is a person who was reasonably expected to use, consume or be affected by the (*description of article*);**

**4. The (*description of article*) was not (suitable) (fit) for the particular purpose for which it was warranted;**

**5. This breach of warranty caused the plaintiff (injuries) (damages) (losses); and**

**6. Within a reasonable time after the plaintiff discovered or should have discovered the alleged breach of warranty, the plaintiff notified the defendant of such breach.**

**If you find that any one or more of these (*number*) statements has not been proved, then your verdict (on this claim) must be for the defendant.**

**On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*in-***

*sert any affirmative defense that would be a complete defense to plaintiff's claim).*

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. This instruction is applicable only to cases involving claims for breach of implied warranty of fitness for a particular purpose under section 4-2-315, C.R.S. Where the claim is one of lack of fitness for ordinary purposes under section 4-2-314, C.R.S., Instruction 14:10 should be used rather than this instruction. For a discussion of the differences between an implied warranty of fitness for a particular purpose and an implied warranty of fitness for ordinary purposes as a form of the implied warranty of merchantability, see **Palmer v. A.H. Robins Co.**, 684 P.2d 187 (Colo. 1984). Both warranties may arise out of the same transaction and coexist. *Id.*; **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989), *rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991).

2. The Notes on Use to Instruction 14:8 are also applicable to this instruction and should be read and applied accordingly.

3. Whenever this instruction is given, Instruction 14:14 and the first paragraph of Instruction 14:16 should also be given. The remaining portion of Instruction 14:16 dealing with exclusion or modification of implied warranties should be given only if applicable.

#### Source and Authority

1. This instruction is supported by the Colorado statute governing breach of an implied warranty of fitness for a particular purpose, § 4-2-315, as it has been interpreted in the case law. See **Palmer**, 684 P.2d at 208-09; **Simon v. Coppola**, 876 P.2d 10 (Colo. App. 1993) (citing instruction); **Deacon**, 782 P.2d at 864; **Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984).

2. Unlike the implied warranty of merchantability, see § 4-2-314, the implied warranty of fitness for a particular purpose is not limited to sellers who are also merchants; it applies to sellers generally. See § 4-2-315 & cmt. 4.



3. In the event of conflict with other express or implied warranties, the implied warranty of fitness for a particular purpose will generally be controlling. § 4-2-317(c), C.R.S.

## 14:14 IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE—DEFINED

An implied warranty that goods are fit or suitable for a particular purpose is created if:

1. At the time the seller makes the contract of sale, (he) (she) (it) has reason to know of any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods for that purpose; and

2. The buyer in fact relies on the skill or judgment of the seller.

### Notes on Use

Because this instruction deals only with an implied warranty of fitness for a particular purpose under section 4-2-315, C.R.S., it should be used only in conjunction with Instruction 14:13. It does not concern the implied warranty of fitness for ordinary uses, as that warranty is included in the implied warranty of merchantability under section 4-2-314, C.R.S.

### Source and Authority

1. This instruction is supported by section 4-2-315. See **Wallman v. Kelley**, 976 P.2d 330 (Colo. App. 1998) (referring to official comment 1 to section 4-2-315); **Aetna Cas. & Sur. Co. v. Crissy Fowler Lumber Co.**, 687 P.2d 514 (Colo. App. 1984); **Klipfel v. Neill**, 30 Colo. App. 428, 494 P.2d 115 (1972); see also **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989), *rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991).

2. To establish an implied warranty of fitness for a particular purpose, the buyer must actually be relying upon the seller's skill or judgment to select or furnish the buyer with the particular product. **Wallman**, 976 P.2d at 334 (that plaintiff would have relied on seller's expertise if seller had told plaintiff not to take herbal medicine was insufficient to raise issue of fact as to whether plaintiff actually relied on seller's skill or judgment).

## 14:15 NOTICE OF BREACH OF WARRANTY—WHAT CONSTITUTES

**Plaintiff, (name), cannot recover for breach of warranty unless (he) (she) (it) notified the defendant, (name), of the breach within a reasonable time after the plaintiff discovered or should have discovered the breach. You must decide what is a reasonable time based upon the facts and circumstances.**

**Notice may be oral or written. No particular form of notice is required as long as it informs the defendant of the breach.**

### Notes on Use

1. This instruction should be used in conjunction with Instructions 14:8, 14:10, or 14:13, when the issue of notice is in dispute and the court has determined that the giving of notice is a necessary element of the plaintiff's claim for relief. *See W. Conference Resorts, Inc. v. Pease*, 668 P.2d 973 (Colo. App. 1983) (under Uniform Commercial Code, whether notice of rejection of goods is satisfactory is question of fact). As to the applicability of this instruction and possible change in language, see the discussion concerning notice in the Notes on Use to Instruction 14:8.

2. When necessary, the second paragraph should be modified to include any applicable rules relating to notice that are contained in section 4-1-202, C.R.S. (notice defined and how made effective).

### Source and Authority

1. In addition to the authority discussed in the Source and Authority to Instruction 14:8 relating to notice, this instruction is supported by section 4-1-205, C.R.S. (defining "reasonable time").

2. In an action against the seller and the manufacturer, where notice of the failure of essential purpose was given to the seller, the commercial buyer could proceed against the manufacturer without giving notice to the manufacturer of the breach of warranty, because the filing of a lawsuit is sufficient notice to encourage settlement of claims, and applicable statutes of limitation protect manufacturers from the difficulties of defending against stale claims. *Cooley v. Big Horn Harvestore Sys., Inc.*, 813 P.2d 736 (Colo. 1991); *see also Wallman v. Kelley*, 976 P.2d 330 (Colo. App. 1998) (in personal injury case, filing of lawsuit may provide sufficient notice).

3. Section 4-2-607(3), C.R.S. (the notice requirement), refers only to



a "buyer" having to give notice. However, official comment 5 to that section suggests that some sort of notice should be given by an injured plaintiff, regardless of whether the plaintiff was or was not a "buyer." Official comment 5 states:

Under this Article various beneficiaries are given rights for injuries sustained by them because of the seller's breach of warranty. Such a beneficiary does not fall within the reason of the present section [§ 4-2-607(3)] in regard to discovery of defects and the giving of notice within a reasonable time after acceptance, since he has nothing to do with acceptance. However, the reason of this section does extend to requiring the beneficiary to notify the seller that an injury has occurred. What is said above, with regard to the extended time for reasonable notification from the lay consumer after the injury is also applicable here; but even a beneficiary can be properly held to the use of good faith in notifying, once he has had time to become aware of the legal situation.

## 14:16 IMPLIED WARRANTIES—CREATION AND EXCLUSION OR MODIFICATION

An implied warranty is one created by operation of law and is not dependent upon the intent of the (manufacturer) (wholesaler) (retailer).

An implied warranty of (merchantability) (or) (fitness) may, however, be excluded or modified.

(1. Any implied warranty is excluded by a [manufacturer] [wholesaler] [retailer] if the [manufacturer] [wholesaler] [retailer] used expressions like “as is,” or “with all faults,” or used other language that in common understanding would call the buyer’s attention to the exclusion of warranty and make it clear there was no implied warranty.)

(2. Any implied warranty may be excluded or modified by a [course of dealing] [or] [course of performance] [or] [usage of the trade].)

(3. Any implied warranty is excluded as to defects that a reasonable examination would have revealed to the buyer under the circumstances if, before entering into the contract, the buyer examined the goods [or a sample or model of the goods] as fully as the buyer desired or if, upon demand of the seller, the buyer refused to make such an examination when the buyer had a reasonable opportunity to do so.)

(4. [Unless an implied warranty of merchantability has been excluded or modified in (the manner just described) (one or more of the ways just described), to] [To] exclude or modify an implied warranty of merchantability or any part of it, the language must, whether spoken or in writing, mention merchantability.)

(5. [Unless an implied warranty of fitness has been excluded or modified in (the manner just described) (one or more of the ways just described), to]

**[To] exclude or modify an implied warranty of fitness, the exclusion must be by a writing. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that, “There are no warranties that extend beyond the description on the face hereof.”)**

#### Notes on Use

1. When applicable, this instruction should be given with Instruction 14:10 or Instruction 14:13.

2. When given, all bracketed and parenthesized portions of this instruction that are not appropriate in light of the evidence in the case should be omitted.

3. For an exclusion made in a writing under numbered paragraph 4 (merchantability) or an exclusion that must be in a writing under numbered paragraph 5 (implied warranty of fitness for a particular purpose), the writing must be conspicuous. § 4-2-316(2), C.R.S. However, “[w]hether a term or clause is ‘conspicuous’ or not is a decision for the court.” § 4-1-201(10), C.R.S. Consequently, numbered paragraph 4 should not be given if the claimed exclusion is in writing and numbered paragraph 5 should not be given, unless the court has first determined under the tests set out in section 4-1-201(10) that the written language is conspicuous.

4. When breach of an express warranty is also claimed, this instruction may need to be modified to avoid confusion. *See* § 4-2-317, C.R.S. (Express and implied warranties are cumulative and must be construed as consistent if it is reasonable to do so; express warranties displace inconsistent implied warranties other than the implied warranty of fitness for a particular purpose.); *see also* § 4-2-316 (expressing policy against unreasonable limitations or negations of a warranty).

5. For definitions of “course of performance,” “course of dealing,” and “usage of trade,” see section 4-1-303, C.R.S.

#### Source and Authority

1. This instruction is supported by section 4-2-316.

2. For an illustration of whether limiting language accompanying an express warranty may be sufficient to disclaim or exclude an implied warranty of merchantability under numbered paragraph 1 of the instruction, see **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975) (distinguishing between commercial and consumer buyers). *See also* **Boyd v. A.O. Smith Harvestore Prods., Inc.**, 776 P.2d 1125 (Colo. App. 1989) (discussing sufficiency of the evidence for



trial court to conclude that express warranty had been excluded as a matter of law).

3. As to the applicability of an exclusion or modification to a subsequent buyer, user, or affected person, see **Wenner Petro. Corp. v. Mitsui & Co. (U.S.A.)**, 748 P.2d 356 (Colo. App. 1987).

4. Although a manufacturer has made a disclaimer of warranties that satisfies the pertinent provisions of the Uniform Commercial Code, each subsequent seller must make its own independent disclaimer in order to be protected from warranty liability. **Graham Hydraulic Power, Inc. v. Stewart & Stevenson Power, Inc.**, 797 P.2d 835 (Colo. App. 1990).

5. For discussion of a disclaimer that limited the remedy, but failed of its essential purpose and, therefore, did not preclude the buyer's recovery, see **Cooley v. Big Horn Harvestore Sys., Inc.**, 813 P.2d 736 (Colo. 1991); *see also* **Keller v. A.O. Smith Harvestore Prods., Inc.**, 819 P.2d 69 (Colo. 1991) (clause in integrated sales agreement that specifically disclaimed reliance on representations made prior to agreement's execution did not preclude finding that buyer relied on those representations).

**C. PRODUCT LIABILITY FOR NEGLIGENCE****14:17 MANUFACTURER'S LIABILITY BASED ON NEGLIGENCE—ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* *(its)* claim of negligence, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant manufactured the *(insert description of article)*;

2. The defendant was negligent by failing to exercise reasonable care to prevent the *(description of article)* from creating an unreasonable risk of harm to the person or property of one who might reasonably be expected to *(use)* *(consume)* *(or)* *(be affected)* by the *(description of article)* while it was being used in the manner the defendant might have reasonably expected;

3. The plaintiff was one of those persons the defendant should reasonably have expected to *(use)* *(consume)* *(or)* *(be affected)* by the *(description of article)*; and

4. The plaintiff had *(injuries)* *(damages)* *(losses)* that were caused by the defendant's negligence, while the *(description of article)* was being used in a manner the defendant should reasonably have expected.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict *(on this claim)* must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, *(then your verdict must be for the plaintiff)* *(then you must consider the defendant's affirmative defense(s) of [in-*

*sert any affirmative defense that would be a complete defense to plaintiff's claim).*

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case. *See Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993) (the seat-belt defense, § 42-4-237(7), C.R.S., applies in product liability action only to mitigate noneconomic damages and may not be used in support of a comparative fault defense).

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly raised that would bar the plaintiff's entire claim—for example, release—additional questions covering such defense must be included in the comparative fault instructions and special verdict forms given in the case. Concerning the issues of comparative fault, causation and misuse, *see States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990); and *Patterson v. Magna American Corp.*, 754 P.2d 1385 (Colo. App. 1988) (no evidence plaintiff was using product other than in way intended).

5. Other appropriate instructions defining the terms used in this instruction, for example, Instruction 9:6, defining “negligence,” must



also be given with this instruction, in particular, the appropriate instructions relating to causation. *See* Instructions 9:18 to 9:21.

6. In appropriate cases, a more suitable word should be substituted for “manufacturing,” such as, “producing,” “canning,” “packaging,” “inspecting,” etc.

7. For cases involving the doctrine of *res ipsa loquitur* generally, see Instruction 9:17. *See also* **Chapman v. Harner**, 2014 CO 78, ¶¶ 25-26, 339 P.3d 519 (*Res ipsa loquitur* creates a rebuttable presumption that the defendant was negligent; it does not shift the burden of proof to a defendant to show he was not negligent.).

8. For cases involving a manufacturer of food or drink sold in sealed containers, see Instructions 14:20 and 14:21.

### Source and Authority

This instruction is supported by **Webb v. Dessert Seed Co.**, 718 P.2d 1057 (Colo. 1986); **Howard v. Avon Products, Inc.**, 155 Colo. 444, 395 P.2d 1007 (Colo. 1964); **Shaw v. General Motors Corp.**, 727 P.2d 387 (Colo. App. 1986); **Downing v. Overhead Door Corp.**, 707 P.2d 1027 (Colo. App. 1985); and **Bailey v. Montgomery Ward & Co.**, 635 P.2d 899 (Colo. App. 1981). *See also* **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993); RESTATEMENT (SECOND) OF TORTS § 395 (1965).

## **14:18 MANUFACTURER'S DUTY AS TO PARTS OBTAINED FROM OTHER SOURCES**

When the manufacturer of (an article) (a product) uses any material or part obtained from another source, the manufacturer has a duty to inspect (and) (or) test that material or part to the extent a reasonably careful person would under the same or similar circumstances, to make the finished (article) (product) reasonably safe for the uses to which it might reasonably be expected to be put. Failure to fulfill that duty is negligence.

However, if the manufacturer performs that duty, the manufacturer is not responsible for (injuries) (damages) (losses) resulting from the use of that material or part, even though it may be defective.

On the other hand, if the manufacturer performed that duty, but later becomes aware of a defective or dangerous condition resulting from the use of the material or part, then the manufacturer has the duty to give notice of the defect or danger to such persons and in such manner as a reasonably careful person would give under the same or similar circumstances to avoid (injuries) (damages) (losses) to others.

### **Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. This instruction, when applicable, should be used in conjunction with Instruction 14:17.
3. The second paragraph should be omitted unless evidence of an inspection has been introduced and that evidence is sufficient to present the questions enumerated in the second paragraph to the jury.
4. Similarly, the third paragraph should be given only when evidence has been introduced that the manufacturer acquired knowledge of the defect or dangerous condition after an inspection and when that evidence is sufficient to present the questions enumerated in the third paragraph to the jury. If the third paragraph is given, Instruction 14:19 may also be applicable.

5. In appropriate cases, a more suitable word should be substituted for "manufacturing," such as, "producing," "canning," etc.

6. For instructions concerning the liability of component parts manufacturers, see Notes on Use to Instruction 14:1.

### Source and Authority

The first paragraph of this instruction is supported by **International Harvester Co. v. Sharoff**, 202 F.2d 52 (10th Cir. 1953), as is the second paragraph by implication.



## 14:19 MANUFACTURER'S/SELLER'S DUTY TO WARN

If a (manufacturer) (seller) of (an article) (a product) knows or in the exercise of reasonable care should know that (1) the use of the (article) (product) may be harmful or injurious to a (consumer) (user), and (2) that risk of harm or injury is not obvious to a reasonable (consumer) (user), then the (manufacturer) (seller) must use reasonable care to warn the (consumer) (user) of the risk of harm or injury if a reasonably careful person would under the same or similar circumstances. The failure to do so is negligence.

### Notes on Use

1. Use whichever parenthesized words are most appropriate. This instruction should be given in cases involving negligent failure to warn. When the issue of foreseeability is in dispute, the trial court cannot rule on the duty to warn issue as a matter of law, because the issue of foreseeability will be a question for the jury to decide. **Mile Hi Concrete, Inc. v. Matz**, 842 P.2d 198 (Colo. 1992).

2. The usual method of warning a consumer is by labeling. However, unless a warning by label is required by statute, in which case the failure to give the required warning may be negligence per se, *see, e.g.*, **White v. Rose**, 241 F.2d 94 (10th Cir. 1957) (by implication), other methods of giving warning may be reasonable, depending on the circumstances. In those cases, the last sentence of this instruction should be omitted or be appropriately modified.

3. Where the failure to give a warning, or to give a proper warning, would be negligence per se, Instruction 9:14 should be used rather than this instruction. Illustrative statutes requiring warnings by label are parts 4 and 5 of title 25, article 5, of the Colorado Revised Statutes. *See Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) (evidence supported negligence per se verdict for violations of section 25-5-403(1)(a), C.R.S.).

4. The rule stated in this instruction is applicable to all sellers, not just to manufacturers. *See* RESTATEMENT (SECOND) OF TORTS §§ 388, 399 (1965). There may be situations, however, when a seller, for example, a retailer, would have no reason to know, or in the exercise of reasonable care would not be expected to know, that the use of a particular product may be dangerous. In the absence of sufficient evidence of that knowledge or failure to use reasonable care, this instruction should not be

given. There may be other circumstances in which a warning may not be required as a matter of law. In those circumstances, this instruction should not be given.

5. If a seller of a product is aware that the use of its product in conjunction with another product may cause a deterioration of the other product and create a dangerous condition, the seller has a duty to use due care to warn customers of the danger. **Halliburton v. Pub. Serv. Co. of Colo.**, 804 P.2d 213 (Colo. App. 1990) (supplier of natural gas, that knew of a potential gas leak in its customers' appliances, had a duty to take corrective action, including adequately warning of the danger). In these circumstances, this instruction must be appropriately modified.

### Source and Authority

This instruction is supported by RESTATEMENT (SECOND) OF TORTS sections 388 and 399 (1965). *See also* **Fibreboard Corp. v. Fenton**, 845 P.2d 1168 (Colo. 1993) (discussing distinction between claims for negligent failure to warn and strict liability failure to warn); **Palmer**, 684 P.2d at 198; **Howard v. Avon Prods., Inc.**, 155 Colo. 444, 395 P.2d 1007 (1964) (discussing when duty to warn of possibility of allergic reaction may arise); **Vista Resorts, Inc. v. Goodyear Tire & Rubber Co.**, 117 P.3d 60 (Colo. App. 2004) (component-part manufacturer was not entitled to jury instruction that it had no duty to foresee or warn of all dangers that may result from use of final product); **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993) (noting that both negligent failure to warn and strict liability failure to warn employ "negligence terms," and that the same evidence is frequently used to establish both claims); **Deacon v. Am. Plant Food Corp.**, 782 P.2d 861 (Colo. App. 1989) (supplier may be negligent per se under statute protecting consumers against manufacture and sale of contaminated fertilizer, §§ 35-12-101 to -120, C.R.S.), *rev'd on other grounds sub nom. Stone's Farm Supply, Inc. v. Deacon*, 805 P.2d 1109 (Colo. 1991); **Bailey v. Montgomery Ward & Co.**, 635 P.2d 899 (Colo. App. 1981) (approving instruction and holding that seller has a duty to give user adequate warning of unreasonable danger that seller knows or should know is involved in the use of product).

## 14:20 LIABILITY FOR INJURY FROM FOOD OR BEVERAGE IN SEALED CONTAINER—ELEMENTS OF LIABILITY

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) claim of negligence in (manufacturing) (packaging) (bottling) (placing upon the market) a (package of food) (bottle of beverage) for human consumption, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant (manufactured) (packaged) (bottled) (placed upon the market) the product for human consumption;

2. The plaintiff was one of those persons the defendant should reasonably have expected to (use) (consume) (or) (be affected by) the product;

3. Because of negligence of the defendant the (package) (bottle) contained a foreign substance when it left the possession of the defendant;

4. The plaintiff (ate) (drank) the (food) (beverage) with the foreign substance in it; and

5. The (eating) (drinking) of the (food) (beverage) caused the plaintiff (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any



one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28 to 14:33. If, in addition to comparative fault, an affirmative defense has been properly raised that would bar the plaintiff's entire claim—for example, release—additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. For cases involving *res ipsa loquitur* for a claim relating to the consumption of food or beverage in a sealed container, *see* the Note to Instruction 14:21. Otherwise, Instruction 9:6, defining “negligence,” should be used. The usual “proximate cause” instruction that should be given with this instruction is Instruction 9:18.

6. If necessary, a definition of “foreign substance” should be given.

#### Source and Authority

This instruction is supported by **Safeway Stores, Inc. v. Rees**, 152 Colo. 318, 381 P.2d 999 (1963), and the authorities cited in the Source and Authority to Instruction 14:17.

## 14:21 PRIMA FACIE NEGLIGENCE LIABILITY FOR INJURY FROM FOOD OR BEVERAGE IN SEALED CONTAINER (RES IPSA LOQUITUR)

### INSTRUCTION DELETED

#### Note

1. The instruction previously included is deleted due to the lack of any Colorado appellate decision specifically dealing with the subject matter of this instruction.

2. Consideration of a *res ipsa loquitur* instruction tendered in an appropriate case involving a claim resulting from consumption of food or beverage in a sealed container requires conformity with **Chapman v. Harner**, 2014 CO 78, ¶¶ 25-26, 339 P.3d 519, and **Krueger v. Ary**, 205 P.3d 1150 (Colo. 2009). In those cases, the Colorado Supreme Court held that a rebuttable presumption “shifts the burden of going forward to the party against whom it is raised.” **Krueger**, 250 P. 3d at 1154. If the presumption applies and is not rebutted by legally sufficient evidence, then the presumed fact is established as a matter of law. *Id.* at 1156. If the presumption applies and is rebutted by legally sufficient evidence, the presumption is destroyed and leaves only a permissible inference of the presumed fact. **Chapman**, ¶ 25; **Krueger**, 205 P.3d at 1156. In neither scenario is the jury instructed about the presumption. See Notes on Use to Instructions 3:5 and 9:17.

## **D. STRICT PRODUCT LIABILITY FOR MISREPRESENTATION**

### **14:22 ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) (its) claim of misrepresentation of a product, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant sold the *(description of product or component part)*;

2. The defendant was engaged in the business of selling the *(description of product or component part)* for resale, use or consumption;

3. The defendant misrepresented a fact concerning the character or quality of the *(description of product or component part)* that would be material to potential purchasers or users of the product;

4. The misrepresentation was made to potential purchasers or users as members of the public at large;

5. As a purchaser or user, (the plaintiff) (or) (some third person) reasonably relied on the misrepresentation;

6. The plaintiff was a person who would reasonably be expected to (use) (consume) (or) (be affected by) the *(description of product or component part)*; and

7. The plaintiff had (injuries) (damages) (losses) caused by the reasonable reliance of (the plaintiff) (or) (the third person) on the misrepresentation.

If you find that any one or more of these *(number)* statements has not been proved by a preponderance of the evidence, then your verdict (on this claim) must be for the defendant.



**On the other hand, if you find that all of these (number) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).**

**If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized words are appropriate and omit the last two paragraphs if no affirmative defense has been raised or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. When the affirmative defense of comparative fault applies, this instruction must be appropriately modified and should be given in conjunction with the appropriate comparative fault instructions. *See* Instructions 14:28-14:33. If, in addition to comparative fault, an affirmative defense has been properly raised that would bar the plaintiff's entire claim—for example, release—additional questions covering that defense must be included in the comparative fault instructions and special verdict forms given in the case.

5. Other appropriate instructions defining the terms and phrases used in this instruction, for example, Instruction 14:23, defining “misrepresentation of material fact,” and Instruction 14:24, defining “rea-

sonable reliance,” as well as the applicable instructions relating to causation from Chapter 9, must also be given with this instruction.

6. This instruction is applicable to claims for damages for physical injuries caused to persons or property because of the reasonable reliance of the plaintiff or another on a misrepresentation concerning the character or quality of a product made to the public at large by any seller regularly engaged in the business of selling those products. It applies to such a seller “even though the representation is an innocent one and is not made fraudulently or negligently.” **Am. Safety Equip. Corp. v. Winkler**, 640 P.2d 216, 219 (Colo. 1982).

7. This instruction applies only to a manufacturer, as defined in section 13-21-401(1), C.R.S., that knowingly or otherwise actively engaged in making the misrepresentation to the public.

8. An action under this instruction may also be available against one who “leases” rather than “sells” products. § 13-21-401(3). In a case involving a lease, this instruction must be appropriately modified.

### Source and Authority

1. This instruction is supported by **American Safety Equipment Corp.**, 640 P.2d at 219; RESTATEMENT (SECOND) OF TORTS § 402B (1965); and section 13-21-401(3) (definition of seller).

2. As to the applicability of strict liability in tort rules to manufacturers of component parts, see **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978); and **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975). *See also* **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993); **Bond v. E.I. Du Pont De Nemours & Co.**, 868 P.2d 1114 (Colo. App. 1993); **Shaw v. Gen. Motors Corp.**, 727 P.2d 387 (Colo. App. 1986).

## 14:23 MISREPRESENTATION OF MATERIAL FACT—DEFINED

A misrepresentation of a material fact concerning the character or quality of a product is:

1. Any oral or written words, conduct, or combination of words and conduct that create an untrue or mistaken impression in the mind of another about the character or quality of a product; and

2. The untrue or mistaken impression is of a fact that would be important to a purchaser or user in determining his or her course of action.

### Notes on Use

1. This instruction should be given in conjunction with Instruction 14:22 whenever numbered paragraph 3 of that instruction is given to the jury.

2. If the representation is in some form other than words, such as a picture, drawing, or illustration, this instruction must be appropriately modified.

3. Statements of opinion will not generally constitute a misrepresentation of a material fact. RESTATEMENT (SECOND) OF TORTS § 402B cmt. g (1965). For circumstances in which it may, however, see Instruction 19:15. In those cases, that instruction, appropriately modified, should be given with this instruction.

### Source and Authority

This instruction is supported by the authorities cited in the Source and Authority to Instructions 19:3 and 19:4; **American Safety Equipment Corp. v. Winkler**, 640 P.2d 216 (Colo. 1982); and RESTATEMENT (SECOND) OF TORTS section 402B comments g and h.



**14:24 REASONABLE RELIANCE—DEFINED**

A person relies on a misrepresentation if that person takes action that he or she otherwise would not take or decides not to take action that he or she would otherwise take because he or she believes the misrepresented information is true.

A person's reliance on a misrepresentation is reasonable if that person believes the information to be true and a reasonable person with the same intelligence, education and experience would also have believed it to be true under the same or similar circumstances.

**Notes on Use**

This instruction should be given in conjunction with Instruction 14:22 whenever numbered paragraph 5 of that instruction is given to the jury.

**Source and Authority**

This instruction is supported by the authorities cited in the Source and Authority to Instructions 19:7 and 19:8; **American Safety Equipment Corp. v. Winkler**, 640 P.2d 216 (Colo. 1982); and RESTATEMENT (SECOND) OF TORTS section 402B comment j (1965).

## **E. AFFIRMATIVE DEFENSES AND DEFENSE CONSIDERATIONS**

### **14:25 AFFIRMATIVE DEFENSE—UNREASONABLE, KNOWING USE OF DEFECTIVE PRODUCT OR PRODUCT NOT IN COMPLIANCE WITH WARRANTY**

The voluntary and unreasonable use of a defective product with knowledge of the specific danger created by a defect is an affirmative defense.

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on the plaintiff's claim of damages for (sale of a defective product) (breach of warranty) if this affirmative defense is proved. This affirmative defense is proved if you find all of the following:

1. At the time the plaintiff (was) (claims to have been) (injured) (damaged), (he) (she) (it) had actual knowledge of the specific danger created by the defect, and knew that this specific danger created a risk of (injury) (damage);

2. The plaintiff voluntarily and unreasonably exposed (himself) (herself) (itself) to the risk of (injury) (damage); and

3. The plaintiff's (use) (continued use) of the product was a cause of the plaintiff's claimed (injuries) (damages).

#### **Notes on Use**

1. Use whichever parenthesized words are most appropriate.

2. In cases in which the court has determined that the comparative fault statute, § 13-21-406, C.R.S., applies and that the defense covered by this instruction would constitute comparative fault under that statute, Instruction 14:28 should be used rather than this instruction.

3. If there is evidence that efforts had been made to correct the

defect or to remedy the breach of warranty of which the plaintiff was previously aware, the language in numbered paragraph 1 should be modified to substitute or add the following: "or (he) (she) (it) did not have a reasonable basis for believing the (defect) (noncompliance with the warranty), of which (he) (she) (it) was previously aware, had been corrected." See **Hensley v. Sherman Car Wash Equip. Co.**, 33 Colo. App. 279, 520 P.2d 146 (1974).

4. When this instruction is given, an appropriate instruction from Chapter 9 defining "cause" should also be given.

#### Source and Authority

This instruction and the Notes on Use are supported by **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978) (discussing elements of the defense in action predating enactment of comparative fault statute, § 13-21-406, C.R.S.); **Hiigel v. General Motors Corp.**, 190 Colo. 57, 544 P.2d 983 (1975) (strict liability in tort); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (plaintiff's experience and his previous observation of defect were sufficient evidence that he knew specific danger associated with defect and used product with knowledge of that danger); **Kinard v. Coats Co.**, 37 Colo. App. 555, 553 P.2d 835 (1976) (same); **Culp v. Rexnord & Booth-Rouse Equipment Co.**, 38 Colo. App. 1, 553 P.2d 844 (1976) (same); and **Hensley**, 33 Colo. App. at 283-84, 520 P.2d at 148-49. See also **Jackson v. Harsco Corp.**, 673 P.2d 363 (Colo. 1983) (insufficient evidence that plaintiff had actual knowledge of danger created by defect); **Zertuche v. Montgomery Ward & Co.**, 706 P.2d 424 (Colo. App. 1985); **Nelson v. Caterpillar Tractor Co.**, 694 P.2d 867 (Colo. App. 1984); **Littlejohn v. Stanley Structures, Inc.**, 688 P.2d 1130 (Colo. App. 1984); **Roberts v. May**, 41 Colo. App. 82, 583 P.2d 305 (1978); **Good v. A. B. Chance Co.**, 39 Colo. App. 70, 565 P.2d 217 (1977); RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).



## 14:26 AFFIRMATIVE DEFENSE—RISK OF AN UNAVOIDABLY UNSAFE PRODUCT

The defendant, *(name)*, is not legally responsible to the plaintiff, *(name)*, on the plaintiff's claim of damages for (sale of a defective product) (breach of the implied warranty of *[insert specific description]*) if the affirmative defense of an unavoidably unsafe product is proved. This defense is proved if you find all of the following:

At the time the *(insert description of product)* was (manufactured) (sold):

1. The sale and use of *(description of product)* provided a benefit to the users that greatly outweighed the risk of *(insert specific description of risk involved)*, resulting from the use of *(description of product)*;

2. The risk of *(specific description of risk involved)* could not have been avoided by the defendant through the use of the highest standards of scientific and technical knowledge available at the time, even if the defendant knew of them;

3. The benefit to the users of *(description of product)* could not be achieved in another manner with less risk even if the defendant had used the highest standards of scientific and technical knowledge available at the time; and

4. The defendant provided adequate warnings concerning the risk of *(specific description of risk involved)* that met the highest standards of scientific and technical knowledge available at the time, regardless of whether the defendant knew of the standards.

### Notes on Use

Use whichever parenthesized words are appropriate.

**Source and Authority**

1. This instruction is supported by **Belle Bonfils Memorial Blood Bank v. Hansen**, 665 P.2d 118 (Colo. 1983) (construing and applying RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965)). *See also Ortho Pharm. Corp. v. Heath*, 722 P.2d 410 (Colo. 1986).

2. The unavoidably unsafe risk of a product is an affirmative defense in actions brought on the theory of strict liability in tort for the sale of a defective product under Instruction 14:1. **Ortho Pharm. Corp.**, 722 P.2d 415-16; **Belle Bonfils Mem'l Blood Bank**, 665 P.2d at 126-27. In certain instances, it may also be a defense to an action for breach of warranty of fitness for a particular purpose under Instruction 14:13, and for some breaches of the implied warranty of merchantability under Instruction 14:10, in particular, breach of the implied warranty of merchantability in the form of not being "fit for ordinary purposes." **Belle Bonfils Mem'l Blood Bank**, 665 P.2d at 127. It is not, however, a defense to a claim based on negligence (Instruction 14:17) or breach of express warranty (Instruction 14:8). *Id.*

3. An unavoidably unsafe product may be defective and unreasonably dangerous if the manufacturer fails to give an adequate warning of the unsafe risk and that risk is not one within the contemplation of the ordinary user or consumer. *See Belle Bonfils Mem'l Blood Bank*, 665 P.2d at 123-26; **Hamilton v. Hardy**, 37 Colo. App. 375, 549 P.2d 1099 (1976), *overruled on other grounds by State Bd. of Med. Exam'rs v. McCroskey*, 880 P.2d 1188 (Colo. 1994); RESTATEMENT (SECOND) OF TORTS § 402A cmts. i, j, & k (1965). The same rule applies to a risk that "manifests itself when [an unavoidably unsafe] product is used in an unintended, but foreseeable, manner." **Uptain v. Huntington Lab, Inc.**, 685 P.2d 218, 220 (Colo. App. 1984), *aff'd on other grounds*, 723 P.2d 1322 (Colo. 1986).

## 14:27 AFFIRMATIVE DEFENSE—MISUSE OF PRODUCT

A manufacturer of a product is not legally responsible for (injuries) (damages) (losses) caused by a product if:

1. The product was used in a manner or for a purpose other than that which was intended;
2. The unintended use could not reasonably have been expected by the manufacturer; and
3. The unintended use, rather than a defect, if any, in the product caused the plaintiff's claimed (injuries) (damages) (losses).

If you find that all of these three statements have been proved, then your verdict must be for the manufacturer.

(On the other hand, if you find that any of these three statements has not been proved, you may still consider whether plaintiff's use of the product constitutes comparative fault, as that term is defined in these instructions.)

### Notes on Use

1. This instruction should be given in those cases in which the manufacturer denies that the product is defective or that the defect, if any, caused damages, and it further claims that unforeseeable misuse of the product caused plaintiff's damages. See **Armentrout v. FMC Corp.**, 842 P.2d 175 (Colo. 1992) (if there was no competent evidence that would support a conclusion that product misuse was unforeseeable, the trial court erred in submitting product misuse instruction to the jury); **Schmutz v. Bolles**, 800 P.2d 1307 (Colo. 1990) (same); **White v. Caterpillar, Inc.**, 867 P.2d 100 (Colo. App. 1993) (distinguishing facts in **Armentrout** and **Schmutz**, and holding that instruction was properly given where manufacturer did not have prior notice of alleged misuse); see also **Walcott v. Total Petro., Inc.**, 964 P.2d 609 (Colo. App. 1998) (customer's use of gasoline to set another person on fire constituted unforeseeable misuse of product as a matter of law); **Koehn v. R.D. Werner Co.**, 809 P.2d 1045 (Colo. App. 1990).

2. In 2003, the Legislature codified product misuse in section 13-21-



402.5, C.R.S. This statute applies to all product liability claims regardless of the theory. The statute provides that a product liability claim may not be commenced or maintained if, at the time the injury, death or property damage occurred, the product was being used in a manner or for a purpose other than that which was intended and which could not reasonably have been expected, and such misuse was a cause of the injury, death, or property damage. This statute may present an issue as to whether the Legislature intended to eliminate the affirmative defense of misuse and instead require that the plaintiff prove, as an element of liability, that misuse was not a cause of the plaintiff's injuries, damages, or losses. The Committee takes no position on this issue. However, counsel and the trial court should be aware of this issue when the evidence is sufficient to warrant instructing the jury on the issue of misuse.

3. The Colorado appellate courts have recognized that misuse of a product can be a complete bar to a plaintiff's product liability claims. *See, e.g., Uptain v. Huntington Lab, Inc.*, 723 P.2d 1322 (Colo. 1986). They have also recognized that improper use of a product can be a form of comparative fault, reducing plaintiff's damages. *See, e.g., Miller v. Solaglas Cal., Inc.*, 870 P.2d 559 (Colo. App. 1993). Without attempting to resolve the still unanswered questions of whether "misuse" and "improper use" are separate concepts and whether "misuse" as a complete bar is an affirmative defense or simply a negation of causation, the Committee recommends the following approach. If the only issue involving "misuse" is misuse as a complete bar to plaintiff's product liability claims, this instruction should be given without the parenthesized paragraph. If the only issue is improper use or use in an improper fashion as a form of comparative fault that reduces plaintiff's damages, only Instruction 14:29 should be given. If the evidence would support submitting to the jury both issues (whether the conduct was a complete bar or a form of comparative fault) and, thus, permit the jury to find either one, both this instruction (including the final parenthesized paragraph) and Instruction 14:29 should be given.

4. For the affirmative defense of the knowing, unreasonable use of a defective product, see Instruction 14:25.

### Source and Authority

1. This instruction is supported by **Uptain**, 723 P.2d at 1325 (citing an earlier version of this instruction with approval as correctly stating the law of misuse as a question of causation). *See also Jackson v. Harsco Corp.*, 673 P.2d 363, 367 (Colo. 1983) (holding that "misuse by an injured party which cannot reasonably be anticipated . . . can be [used to show] that the conduct of the user, and not the alleged defect . . . actually caused the accident," and concluding that the evidence was insufficient to show that use was reasonably to be expected); **Kysor Indus. Corp. v. Frazier**, 642 P.2d 908 (Colo. 1982) (plaintiff's injuries caused by dangerous condition created solely by plaintiff's own mishandling or misuse rather than by lack or inadequacy of warnings or instructions); **Pratt v. Rocky Mtn. Nat. Gas Co.**, 805 P.2d 1144

(Colo. App. 1990); **Shultz v. Linden-Alimak, Inc.**, 734 P.2d 146 (Colo. App. 1986) (where user with full knowledge of dangers inherent in his own misuse of a product creates a dangerous condition in the product that injures him, there is no factual basis for submitting case to the jury); **Peterson v. Parke Davis & Co.**, 705 P.2d 1001 (Colo. App. 1985) (jury could properly find product not defective where adequate information and warnings made available to prescribing physician, but physician “misused” drug by not consulting that information and heeding warnings); **Nelson v. Caterpillar Tractor Co.**, 694 P.2d 867 (Colo. App. 1984) (citing earlier version of this instruction); Source and Authority to Instruction 14:1.

2. Concerning the issues of misuse, causation, and comparative fault, see **Patterson v. Magna American Corp.**, 754 P.2d 1385 (Colo. App. 1988) (no evidence plaintiff was using product other than in way manufacturer intended); **Armentrout v. FMC Corp.**, 819 P.2d 522 (Colo. App. 1991), *aff’d in part, rev’d in part on other grounds*, 842 P.2d 175 (Colo. 1992); **Miller**, 870 P.2d at 565-66; and **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990).

3. Written warnings on a product that identify various possible misuses of that product do not make a misuse caused by not reading or abiding by those warnings foreseeable by the manufacturer as a matter of law. **Uptain**, 723 P.2d at 1326; see **Koehn**, 809 P.2d at 1049 (manufacturer or seller may reasonably assume that warnings will be read and heeded). Nor is a user’s failure to follow written warnings or instructions misuse that entitles a manufacturer to a directed verdict. See **Farmland Mut. Ins. Co. v. Chief Indus., Inc.**, 170 P.3d 832 (Colo. App. 2007) (professional installer’s failure to heed warnings and instructions simply created jury question regarding design defect). And, if there is evidence that the user of the product did not receive the warnings, the adequacy of those warnings may be a question for the jury. **Armentrout**, 842 P.2d at 188.

**14:28 AFFIRMATIVE DEFENSE—COMPARATIVE  
FAULT BASED ON UNREASONABLE,  
KNOWING USE OF PRODUCT  
INVOLVING NEGLIGENTLY CREATED  
RISK, PRODUCT NOT IN COMPLIANCE  
WITH WARRANTY, OR DEFECTIVE OR  
MISREPRESENTED PRODUCT**

A form of comparative fault is the voluntary and unreasonable use of a defective product with knowledge of the specific danger created by a defect. Such comparative fault is an affirmative defense that is proved if you find all of the following by a preponderance of the evidence:

1. At the time the plaintiff, (*name*), (was) (claims to have been) injured, (he) (she) had actual knowledge of the specific danger created by the defect, and knew that this specific danger created a risk of (injury) (damages);
2. The plaintiff voluntarily and unreasonably exposed (himself) (herself) to the risk of injury; and
3. The plaintiff's (use) (continued use) of the product after acquiring such knowledge was a cause of (his) (her) claimed injuries.

**Notes on Use**

1. This instruction should be used in conjunction with Instructions 14:1, 14:8, 14:10, 14:12, 14:17, 14:20, or 14:22, but only after the court has first determined that (a) there is sufficient evidence to support it, and (b) as a matter of law, under section 13-21-406, C.R.S., the facts set out in the instruction, if proved, would (1) constitute comparative fault and (2) be a valid defense to the particular product liability claim being made. *See States v. R.D. Werner Co.*, 799 P.2d 427 (Colo. App. 1990) (interpreting section 13-21-406).

2. The Notes on Use to Instruction 14:25 are also applicable to this instruction.

**Source and Authority**

This instruction is supported by the authorities cited in the Source



and Authority to Instruction 14:25 and in the Introductory Note to this Chapter.

It is important to note that the following are not requirements of the statute.

The statute does not require that a defendant be a manufacturer or distributor of the product. It is sufficient that the defendant be a person who is in the business of selling or distributing the product.

It is also important to note that the statute does not require that the plaintiff be a consumer of the product.

The statute does not require that the plaintiff be a person who was injured by the product.

The statute does not require that the plaintiff be a person who was injured by the product.

The statute does not require that the plaintiff be a person who was injured by the product.

**14:29 AFFIRMATIVE DEFENSE—COMPARATIVE  
FAULT BASED ON NEGLIGENCE**

A form of comparative fault is the negligence, if any, of the plaintiff. Such comparative fault is an affirmative defense that is proved if you find both of the following by a preponderance of the evidence:

1. The plaintiff, (*name*), failed to do something that a reasonably careful person would do, or did something that a reasonably careful person would not do, under the same or similar circumstances to protect (himself) (herself) from the (claimed) defect in the product; and

2. That conduct by the plaintiff was a cause of the plaintiff's claimed injuries.

**Notes on Use**

1. This instruction should be used in conjunction with Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22, but only after the court has first determined that (a) there is sufficient evidence to support it, and (b) as a matter of law, under section 13-21-406, C.R.S., the facts set out in the instruction, if proved, would (1) constitute comparative fault and (2) be a valid defense to the particular product liability claim being made.

2. It is unclear what forms of traditional contributory negligence may or may not constitute comparative "fault" under section 13-21-406(1), for example, contributory negligence that only endangers the plaintiff as opposed to behavior that also endangers third persons. See **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559, 566 (Colo. App. 1993) (approving this instruction as setting forth the applicable principles for comparative fault based on negligence; "[u]nder § 13-21-406, the definition of fault includes misuse, as well as a broad range of culpable behaviors including negligence"); **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990) (in a strict product liability case, the concept of comparative negligence embodied in section 13-21-111, C.R.S., is inapplicable); RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

3. If this instruction is given because there is sufficient evidence of certain conduct on the plaintiff's part that the court has determined would constitute comparative fault, and there is also evidence of other conduct to which the jury might apply this instruction, but that conduct would not constitute comparative fault under the statute, then another instruction directing the jury not to consider that conduct as comparative fault under this instruction should also be given.

# Source and Authority

This instruction is supported by the Source and Authority to Instructions 9:2 and 9:4.



**14:30 COMPARATIVE FAULT—ELEMENTS AND  
EFFECT—NO COUNTERCLAIM—  
SINGLE DEFENDANT**

If you find that the plaintiff, (*name*), had damages and that these damages were caused by the (negligence) (or) (fault) of the defendant, (*name*), you must then determine whether the plaintiff was also (negligent) (or) (at fault), and whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages.

The (negligence) (or) (fault) of the plaintiff is an affirmative defense that must be proved by a preponderance of the evidence.

If you find that the plaintiff was (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of the defendant and the (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff.

**Notes on Use**

1. Use whichever parenthesized parts of the instruction are appropriate.
2. This instruction should be given in conjunction with special verdict forms 14:30A and 14:30B, and with appropriate instructions on damages. See Instructions 6:1, 6:1A, & 6:1B.
3. For alternative special verdict forms, see Instruction 4:20.
4. Whenever the affirmative defense of comparative fault has been determined by the court to be applicable, this instruction, Instructions 14:31, 14:32, or 14:33 must be given in conjunction with one or more of Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22, appropriately modified in accord with any applicable Notes on Use. Also, one or more

instructions defining "fault" insofar as plaintiff's conduct is concerned must also be given. *See, e.g.*, Instructions 14:28 & 14:29.

5. For instructions and special verdict forms for use in actions involving designated nonparties under section 13-21-111.5, C.R.S., see Instructions 14:32 through 14:33B. *See also* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997) (noting that section 13-21-111.5 applies to claims of strict liability and that an instruction regarding nonparty liability should be submitted to the jury, similar to instructions regarding comparative fault, but only when there is evidence in the record to support such a claim). Similarly, various modifications may be required in order to enable the trial court to apply any applicable limitations on damages set out in sections 13-21-102.5(3)(a) and (b), C.R.S. (quoted and discussed in the Notes on Use to Instruction 6:1). *See also* Instruction 6:1A (mechanics for submitting special interrogatories).

6. If, in addition to the affirmative defense of comparative fault, the affirmative defense of failure to mitigate damages (Instruction 5:2) or any other affirmative defense, for example, one that would bar the plaintiff's entire claim, such as release or waiver, *see, e.g.*, **Town of Silverton v. Phoenix Heat Source Sys., Inc.**, 948 P.2d 9 (Colo. App. 1997), has been raised, this instruction and its accompanying special verdict forms must be appropriately modified to include those questions necessary to resolve properly all disputed questions of fact relating to such additional affirmative defense, as well as any other matters in dispute between the parties, such as punitive damages.

### Source and Authority

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S. *See also* **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993); **Armentrout v. FMC Corp.**, 819 P.2d 522 (Colo. App. 1991), *aff'd in part, rev'd in part on other grounds*, 842 P.2d 175 (Colo. 1992); **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990).

**14:30A SPECIAL VERDICT—MECHANICS FOR  
SUBMITTING—NO COUNTERCLAIM—  
SINGLE DEFENDANT**

**You are instructed to answer the following questions. You must all agree on your answer to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

**If your answer to (question No. 1) (all of these questions numbered [insert numbers, e.g., 1 and 2]) is “no,” then your foreperson shall complete only Special Verdict Form A, and all jurors must sign it.**

**On the other hand, if your answer to (question No. 1) (any one or more of questions numbered [insert numbers]), is “yes,” then you shall answer the following question(s):**

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*



**If your answer to (question No.) (all of these questions numbered) (*insert specific numbers of questions relating to the comparative fault of plaintiff, e.g., 2, 3, etc.*) is “no,” you shall answer the following question and then your foreperson shall complete only Special Verdict Form B, and all jurors must sign it.**

**3. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (*insert the number assigned in the case to the instruction that sets forth recoverable damages*) that were caused by the (negligence) (or) (fault) of the defendant.**

**On the other hand, if your answer to (question No.) (any one or more of questions numbered) (*insert specific numbers of questions relating to the comparative fault of the plaintiff*) is “yes,” you shall answer the following questions, and then your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**4. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (*insert the number assigned in the case to the instruction that sets forth recoverable damages*) that were caused by the combined (negligence) (or) (fault) of the defendant and by the (negligence) (or) (fault) of the plaintiff.**

**5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the defendant and what percentage by the plaintiff?**

#### Notes on Use

1. Whenever the affirmative defense of comparative fault has been determined by the court to be applicable, this instruction or Instruction 14:32 must be given in conjunction with one or more of Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22, appropriately modified in accord with any applicable Notes on Use.

2. Use whichever parenthesized words and phrases are most appropriate.

3. For instructions and special verdict forms for use in actions involving designated nonparties under section 13-21-111.5, C.R.S., see Instructions 14:32 through 14:33B. *See also* **Barton v. Adams Rental, Inc.**, 938 P.2d 532 (Colo. 1997) (noting that section 13-21-111.5 applies to claims of strict liability, and that an instruction regarding nonparty liability should be submitted to the jury, similar to instructions regarding comparative fault, but only when there is evidence in the record to support such a claim). Similarly, various modifications may be required in order to enable the trial court to apply any applicable limitations on damages set out in section 13-21-102.5(3) (a) and (b), C.R.S. (quoted and discussed in the Notes on Use to Instruction 6:1). *See also* Instruction 6:1A (mechanics for submitting special interrogatories).

4. Whenever this instruction is given, the three special verdict forms in Instruction 14:30B and one or more appropriate instructions defining “fault” insofar as the plaintiff’s conduct is concerned, *see, e.g.*, Instructions 14:28 and 14:29, must also be given.

5. If, in addition to the affirmative defense of comparative fault, the affirmative defense of failure to mitigate damages (Instruction 5:2) or any other affirmative defense, for example, one that would bar the plaintiff’s entire claim, such as release, has been raised, this instruction and its accompanying special verdict forms must be appropriately modified to include those questions necessary to resolve properly all disputed questions of fact relating to that additional affirmative defense, as well as any other matters in dispute between the parties, such as punitive damages.

6. If the plaintiff is seeking the same damages for the same injuries under more than one claim for relief and if it is determined as a matter of law that a particular form of comparative fault, for example, contributory negligence, may be applicable as a defense to one of the plaintiff’s claims, for example, negligence, but not to another, for example, breach of warranty, then this instruction and its accompanying special verdict forms must be appropriately modified.

7. The Notes on Use to Instruction 14:30 are also applicable to this Instruction. *See also* Notes on Use to Instructions 4:4 and 9:33 through 9:34B.

8. For alternative special verdict forms, see Instruction 4:20.

### Source and Authority

This instruction is supported by section 13-21-406, C.R.S. *See also* **Miller v. Solaglas Cal., Inc.**, 870 P.2d 559 (Colo. App. 1993); **Armstrong v. FMC Corp.**, 819 P.2d 522 (Colo. App. 1991), *aff’d in part, rev’d in part on other grounds*, 842 P.2d 175 (Colo. 1992); **States v. R.D. Werner Co.**, 799 P.2d 427 (Colo. App. 1990).

**14:30B SPECIAL VERDICT FORMS—NO  
COUNTERCLAIM—SINGLE  
DEFENDANT—FORMS A, B, AND C**

**FORM A**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____ )	
<b>Plaintiff,</b> )	
<b>v.</b> )	<b>SPECIAL VERDICT</b>
_____ )	<b>FORM A</b>
<b>Defendant.</b> )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED AND ALL  
JURORS HAVE SIGNED EITHER SPECIAL VERDICT  
FORM B OR SPECIAL VERDICT FORM C.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is en-  
titled to recover damages from the defendant, (name),  
on (his) (her) claim of (insert appropriate description, e.g.,  
“negligence,” “breach of the warranty of . . .,” etc.) under  
Instruction No. (insert the number assigned in the  
case to the instruction that sets forth the basic ele-  
ments of liability for the claim, as in Instructions 14:1,  
14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar para-  
graphs so as to include all product liability claims being  
made against the defendant.)*

**(ANSWER: \_\_\_\_\_)**

**We, the jury, having answered (question No. 1)**





*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

(ANSWER: \_\_\_\_\_)

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in 14:29)? (Yes or No)**

ANSWER: \_\_\_\_\_

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*

(ANSWER: \_\_\_\_\_)

**3. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the (negligence) (or) (fault) of the defendant.**

ANSWER: \$ \_\_\_\_\_

We, the jury, having answered (question No. 1) (one or more of the questions numbered [insert specific numbers of all questions relating to claims of liability against the defendant]) "yes," but having answered (question No. 2) ([all] [both] of the questions numbered [insert specific numbers of all questions relating to the comparative fault of the plaintiff]) "no," find the issues for the plaintiff, (name).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Foreperson

## FORM C

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
v.	)	SPECIAL VERDICT
_____	)	FORM C
Defendant.	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM C IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM B.**

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Do you find that the plaintiff, *(name)*, is entitled to recover damages from the defendant, *(name)*, on *(his)* *(her)* claim of *(insert appropriate description, e.g., "negligence," "breach of the warranty of . . .," etc.)* under Instruction No. *(insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?* (Yes or No)

ANSWER: \_\_\_\_\_

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

(ANSWER: \_\_\_\_\_)

2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries)



(damages) (losses) as set forth in Instruction No. (*insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in 14:29*)? (Yes or No)

ANSWER: \_\_\_\_\_

(*Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.*)

(ANSWER: \_\_\_\_\_)

3. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (*insert the number assigned in the case to the instruction that sets forth recoverable damages*) that were caused by the combined (negligence) (or) (fault) of the defendant and by the (negligence) (or) (fault) of the plaintiff.

ANSWER: \$ \_\_\_\_\_

4. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the defendant and what percentage was caused by the plaintiff?

ANSWER: \_\_\_\_\_

Percentage charged to plaintiff, \_\_\_\_\_%  
(name):

Percentage charged to defendant, \_\_\_\_\_%  
(name):

MUST TOTAL: 100% \_\_\_\_\_%

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Foreperson

**Notes on Use**

1. See Notes on Use to Instructions 14:30 and 14:30A.
2. For alternative special verdict forms, see Instruction 4:20.

**14:31 COMPARATIVE FAULT—ELEMENTS AND  
EFFECT—NO COUNTERCLAIM—  
MULTIPLE DEFENDANTS**

If you find that the plaintiff, (*name*), had damages and that these damages were caused by the (negligence) (or) (fault) of one or more of the defendants, (*names*), you must then determine whether the plaintiff was also (negligent) (or) (at fault), and whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages.

The (negligence) (or) (fault) of the plaintiff is an affirmative defense that must be proved by a preponderance of the evidence.

If you find that the plaintiff was (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of each of the defendants, if any, and the (negligence) (or) (fault), of the plaintiff, contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff.

If you find that the plaintiff was not (negligent) (or) (at fault), you must still determine to what extent the (negligence) (or) (fault) of each of the defendants contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

**Notes on Use**

1. See Notes on Use to Instruction 14:30.
2. Use whichever parenthesized parts of the instruction are appropriate.
3. This instruction should be given in conjunction with Instructions 14:31A and 14:31B, and with appropriate instructions on damages. See Instructions 6:1, 6:1A, & 6:1B.



4. For alternative special verdict forms, see Instruction 4:20.

### Source and Authority

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

The (negligence) (or) fault of the plaintiff is an affirmative defense that must be proved by a preponderance of the evidence.

If you find that the plaintiff was negligent (or) at fault, then you must also determine to what extent the (negligence) (or) fault of each of the defendants, if any, and the (negligence) (or) fault of the plaintiff contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) fault, if any, of the plaintiff.

If you find that the plaintiff was not negligent (or) at fault, you must still determine to what extent the (negligence) (or) fault of each of the defendants contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

I am Now on the 4th instruction of 14:31. In the witness or party's name of the instruction was appropriate.

This instruction should be given in a case where the plaintiff is suing for damages to his person or property.

### 14:31A SPECIAL VERDICT—MECHANICS FOR SUBMITTING—NO COUNTERCLAIM— MULTIPLE DEFENDANTS

**You are instructed to answer the following questions. You must all agree on your answer to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**2. Do you find that the plaintiff is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**If your answer to (both) (all) of these questions numbered (insert numbers) is "no," then your foreperson shall complete only Special Verdict Form A and all jurors must sign it.**

**On the other hand, if your answer to any one or more of these questions numbered (insert numbers), is "yes," then you shall answer the following question(s):**

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to (question No.) ([all] [both] of these questions numbered) (insert specific numbers of questions relating to the comparative fault of plaintiff, e.g., 3, 4, etc.) is “no,” you shall answer the following two questions, and then your foreperson shall complete only Special Verdict Form B and all jurors must sign it.**

**4. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover.**

**5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff’s (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, (name of first defendant); and**
- b. the defendant, (name of second defendant).**

**You must enter the figure of zero, “0,” for any defendant you have found was not (negligent) (or) (at fault).**

**On the other hand, if your answer to (question No.) (any one or more of questions numbered) (insert**



*specific numbers of questions relating to the comparative fault of the plaintiff*) is “yes,” you shall answer the following two questions, and then your foreperson shall complete only Special Verdict Form C and all jurors must sign it.

**6. State the total amount of plaintiff’s (injuries) (damages) (losses) under Instruction No. (*insert the number assigned in the case to the instruction that sets forth recoverable damages*) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom the plaintiff is entitled to recover and by the (negligence) (or) (fault) of the plaintiff.**

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff’s (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the plaintiff, (*name*); and**
- b. the defendant, (*name of first defendant*); and**
- c. the defendant, (*name of second defendant*).**

**You must enter the figure of zero, “0,” for any defendant you have found was not (negligent) (or) (at fault).**

#### **Notes on Use**

- 1. Notes on Use to Instruction 14:30 are also applicable to this instruction.
- 2. For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:31B SPECIAL VERDICT FORMS—NO  
COUNTERCLAIM—MULTIPLE  
DEFENDANTS—FORMS A, B, AND C**

**FORM A**

**IN THE \_\_\_\_\_ COURT IN AND FOR  
THE COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____ )	
<b>Plaintiff,</b> )	
<b>v.</b> )	<b>SPECIAL VERDICT</b>
_____ )	<b>FORM A</b>
<b>Defendant.</b> )	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED AND ALL  
JURORS HAVE SIGNED EITHER SPECIAL VERDICT  
FORM B OR SPECIAL VERDICT FORM C.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is en-  
titled to recover damages from the defendant, (name  
of first defendant), on (his) (her) claim of (insert appropri-  
ate description, e.g., "negligence," "breach of the warranty of  
. . . , " etc.) under Instruction No. (insert the number as-  
signed in the case to the instruction that sets forth the basic  
elements of liability for the claim, as in Instructions 14:1,  
14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar para-  
graphs so as to include all product liability claims being  
made against the first defendant.)*

**(ANSWER: \_\_\_\_\_)**

**2. Do you find that the plaintiff, (name), is en-**

**titled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . ," etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**(ANSWER: \_\_\_\_\_)**

**We, the jury, having answered (both) (all) of these questions numbered (insert numbers) "no," find the issues for (both) (all) the Defendants, (names).**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Foreperson**

**FORM B**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

\_\_\_\_\_  
**Plaintiff,**  
v.  
\_\_\_\_\_  
**Defendant.**

**SPECIAL VERDICT  
FORM B**

**DO NOT ANSWER THIS SPECIAL VERDICT FORM B  
IF YOUR FOREPERSON HAS COMPLETED AND ALL**



**JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM C.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**(ANSWER: \_\_\_\_\_)**

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**(ANSWER: \_\_\_\_\_)**

**3. Do you find that the plaintiff was (negligent)**

**(or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (*insert the number of the instruction assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29*)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**4. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (*insert the number assigned in the case to the instruction that sets forth recoverable damages*) that were caused by the combined (negligence) (or) (fault) of all of the Defendants from whom you have found that plaintiff is entitled to recover.**

**ANSWER: \$\_\_\_\_\_**

**5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, (*name of first defendant*); and**
- b. the defendant, (*name of second defendant*).**

**You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).**

**ANSWER:**

Percentage, if any, charged to \_\_\_\_\_%  
 defendant, (name of first defendant):

Percentage, if any, charged to \_\_\_\_\_%  
 defendant, (name of second defendant):

MUST TOTAL: 100% \_\_\_\_\_%

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 Foreperson

### FORM C

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
 Civil Action No. \_\_\_\_\_

_____	)	
Plaintiff,	)	
v.	)	SPECIAL VERDICT
_____	)	FORM C
Defendant.	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM C  
 IF YOUR FOREPERSON HAS COMPLETED AND ALL  
 JURORS HAVE SIGNED EITHER SPECIAL VERDICT  
 FORM A OR SPECIAL VERDICT FORM B.**

**We, the jury, present our Answers to Questions  
 submitted by the Court, to which we have all agreed:**

1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of the first defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence", "breach of the warranty of . . .," etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth



*the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)*

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**(ANSWER: \_\_\_\_\_)**

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**(ANSWER: \_\_\_\_\_)**

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

(ANSWER: \_\_\_\_\_)

4. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover and the (negligence) (or) (fault) of the plaintiff.

ANSWER: \$ \_\_\_\_\_

5. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:

- a. the plaintiff, *(name)*; and
- b. the defendant, *(name of first defendant)*; and
- c. the defendant, *(name of second defendant)*.

You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).

ANSWER:

Percentage charged to plaintiff, *(name)*: \_\_\_\_\_%

Percentage, if any, charged to defendant, *(name of first defendant)*: \_\_\_\_\_%

Percentage, if any, charged to defendant, *(name of second defendant)*: \_\_\_\_\_%

MUST TOTAL: 100% \_\_\_\_\_%

\_\_\_\_\_  
\_\_\_\_\_

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## Foreperson

### Notes on Use

The Notes on Use to Instruction 14:30 are also applicable to this instruction, except this instruction should be used in conjunction with Instruction 14:31.

### Source and Authority

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.



**14:32 COMPARATIVE FAULT—ELEMENTS AND  
EFFECT—NO COUNTERCLAIM—  
SINGLE DEFENDANT—DESIGNATED  
NONPARTY OR NONPARTIES  
INVOLVED**

If you find that the plaintiff, (*name*), had damages and that such damages were caused by the (negligence) (or) (fault) of the defendant, (*name*), you must then determine:

1. Whether the plaintiff was (negligent) (or) (at fault);
2. Whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages;
3. Whether (the designated nonparty, (*name*), was) (any one or more of the designated nonparties, [*names*], were) (negligent) (or) (at fault); and
4. Whether any such (negligence) (or) (fault) of the designated (nonparty) (nonparties) contributed to the plaintiff's damages.

The (negligence) (or) (fault) of the plaintiff and the (negligence) (or) (fault) of (the designated nonparty) (any or all of the designated nonparties) are affirmative defenses that must be proved by a preponderance of the evidence.

If you find that either the plaintiff or (the designated nonparty) (one or more of the designated nonparties) was (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of the defendant, the (negligence) (or) (fault) of the plaintiff, if any, and the (negligence) (or) (fault) of (the designated nonparty) (each of the designated nonparties), if any, contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

**If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff and by the percentage of the (negligence) (or) (fault), if any, of the designated (nonparty) (nonparties).**

#### **Notes on Use**

1. See the Notes on Use to Instruction 14:30.
2. Use whichever parenthesized parts of the instruction are appropriate.
3. This instruction should be given in conjunction with Instructions 14:32A and 14:32B, and with appropriate instructions on damages. See Instructions 6:1, 6:1A, & 6:1B.
4. For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:32A SPECIAL VERDICT—MECHANICS FOR  
SUBMITTING—NO COUNTERCLAIM—  
SINGLE DEFENDANT—DESIGNATED  
NONPARTY OR NONPARTIES  
INVOLVED**

**You are instructed to answer the following questions. You must all agree on your answer to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**If your answer to (this question) ([all] [both] of these questions) is “no,” then your foreperson shall complete only Special Verdict Form A, and all jurors must sign it.**

**On the other hand, if your answer to (this question) (any one or more of these questions), is “yes,” then you shall answer the following question(s):**

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault.)*



**3. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**4. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, as in Instruction 14:28 or 14:29)?**

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to all of these questions numbered (insert specific numbers of questions relating to the comparative fault of plaintiff, and the designated nonparty or nonparties, e.g., 2, 3, etc.) is "no," you shall answer the following question, and then your foreperson shall complete only Special Verdict Form B and all jurors must sign it.**

**5. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the (negligence) (or) (fault) of the defendant.**

**On the other hand, if your answer to any one or more of these questions numbered (insert specific numbers of questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties) is**

**“yes,” you shall then answer the following questions, and your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* that were caused by the combined (negligence) (or) (fault), if any, of:**

- a. the plaintiff; and**
- b. each of the defendants from whom the plaintiff is entitled to recover; and**
- c. (the designated nonparty) (any one or more of the designated nonparties).**

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the plaintiff;**
- b. each of the defendants from whom the plaintiff is entitled to recover; and**
- c. (the designated nonparty) (any one or more of the designated nonparties).**

**You must enter the figure of zero, “0,” for any party or designated nonparty you have found was not (negligent) (or) (at fault).**

#### **Notes on Use**

For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:32B SPECIAL VERDICT FORMS—NO  
COUNTERCLAIM—SINGLE  
DEFENDANT—DESIGNATED  
NONPARTY OR NONPARTIES  
INVOLVED—FORMS A, B, AND C**

**FORM A**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	
_____	)	<b>SPECIAL VERDICT</b>
<b>Defendant.</b>	)	<b>FORM A</b>

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED AND ALL  
JURORS HAVE SIGNED EITHER SPECIAL VERDICT  
FORM B OR SPECIAL VERDICT FORM C.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is en-  
titled to recover damages from the defendant, (name),  
on (his) (her) claim of (insert appropriate description, e.g.,  
“negligence,” “breach of the warranty of . . .,” etc.), under  
Instruction No. (insert the number assigned in the case to  
the instruction that sets forth the basic elements of liability  
for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13,  
14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar para-  
graphs so as to include all product liability claims being  
made against the defendant.)*



(ANSWER: \_\_\_\_\_)

We, the jury, having answered (this) ([both] [all] of these [number]) question(s) “no,” find the issues for the defendant, (name).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Foreperson

FORM B

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

\_\_\_\_\_  
Plaintiff, )  
 )  
 )  
v. ) SPECIAL VERDICT  
 ) FORM B  
\_\_\_\_\_  
Defendant. )

DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM C.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., “negligence,” “breach of the warranty of . . . ,” etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**(ANSWER: \_\_\_\_\_)**

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault).*

**(ANSWER: \_\_\_\_\_)**

**3. Do you find that the designated nonparty, (name), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**4. Do you find that the designated nonparty, (name), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in**

**Instruction No.** *(insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)?*  
**(Yes or No)**

**ANSWER:** \_\_\_\_\_

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**5. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No.** *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* **that were caused by the (negligence) (or) (fault) of the defendant.**

**ANSWER: \$**\_\_\_\_\_

**We, the jury, having answered (question No. 1) (one or more of the questions numbered [insert specific numbers of all questions relating to claims of liability against the defendant]) "yes," but having answered all of the questions numbered (insert specific numbers of all questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties) "no," find the issues for the plaintiff (name).**

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Foreperson**

## FORM C

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO**

**Civil Action No. \_\_\_\_\_**



_____	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
	)	<b>FORM C</b>
_____	)	
<b>Defendant.</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM C IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM B.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . .," etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the defendant.)*

**(ANSWER: \_\_\_\_\_)**

**2. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 2, but in separately numbered questions, any additional forms of comparative fault).*

**(ANSWER: \_\_\_\_\_)**

**3. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**4. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number of the instruction assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**5. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth**

*recoverable damages*) that were caused by the combined (negligence) (or) (fault), if any, of:

- a. the plaintiff; and
- b. the defendant; and
- c. (the designated nonparty) (any one or more of the designated nonparties).

ANSWER: \$\_\_\_\_\_

6. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage, if any, was caused by the (negligence) (or) (fault) of:

- a. the plaintiff; and
- b. the defendant; and
- c. (the designated nonparty) (any one or more of the designated nonparties)?

You must enter the figure of zero, "0," for any party or designated nonparty you have found was not (negligent) (or) (at fault).

ANSWER:

Percentage, if any, charged to \_\_\_\_\_%  
plaintiff, (name):

Percentage charged to \_\_\_\_\_%  
defendant, (name):

Percentage, if any, charged to \_\_\_\_\_%  
designated nonparty, (name of  
first designated nonparty):

Percentage, if any, charged to \_\_\_\_\_%  
designated nonparty, (name of  
second designated nonparty):

MUST TOTAL: 100% \_\_\_\_\_%



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**Foreperson**
**Notes on Use**

For alternative special verdict forms, see Instruction 4:20.

**Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

### 14:33 COMPARATIVE FAULT—ELEMENTS AND EFFECT—MULTIPLE DEFENDANTS—DESIGNATED NONPARTY OR NONPARTIES INVOLVED

If you find that the plaintiff, (*name*), had damages and that these damages were caused by the (negligence) (or) (fault) of any one or more of the defendants, (*names*), you must then determine:

1. Whether the plaintiff was (negligent) (or) (at fault);

2. Whether any such (negligence) (or) (fault) of the plaintiff contributed to the plaintiff's own damages;

3. Whether (the designated nonparty, [*name*], was) (any or all of the designated nonparties, [*name or names*], were) (negligent) (or) (at fault); and

4. Whether any such (negligence) (or) (fault) of the designated (nonparty) (nonparties) contributed to the plaintiff's damages.

The (negligence) (or) (fault) of the plaintiff and the (negligence) (or) (fault) of (the designated nonparty) (any or all of the designated nonparties) are affirmative defenses that must be proved by a preponderance of the evidence.

If you find that either the plaintiff or (the designated nonparty was) (one or more of the designated nonparties were) (negligent) (or) (at fault), then you must also determine to what extent the (negligence) (or) (fault) of each of the defendants, the (negligence) (or) (fault) of the plaintiff, if any, and the (negligence) (or) (fault) of (the designated nonparty) (each of the designated nonparties), if any, contributed to the plaintiff's damages, expressed as a percentage of 100 percent.

**If the plaintiff is allowed to recover, the total amount of the damages awarded will be reduced by the percentage of the (negligence) (or) (fault), if any, of the plaintiff and by the percentage of the (negligence) (or) (fault), if any, of the designated (nonparty) (nonparties).**

**If you find that neither the plaintiff nor (the designated nonparty) (any of the designated nonparties) was (negligent) (or) (at fault), you must still determine to what extent the (negligence) (or) (fault) of each of the defendants contributed to the plaintiff's damages, expressed as a percentage of 100 percent.**

#### **Notes on Use**

1. See the Notes on Use to Instruction 14:30.
2. Use whichever parenthesized parts of the instruction are appropriate.
3. This instruction should be given in conjunction with Instructions 14:33A and 14:33B, and with appropriate instructions on damages. See Instructions 6:1, 6:1A, & 6:1B.
4. For alternative special verdict forms, see Instruction 4:20.

#### **Source and Authority**

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.



**14:33A SPECIAL VERDICT—MECHANICS FOR  
SUBMITTING—NO COUNTERCLAIM—  
MULTIPLE DEFENDANTS—  
DESIGNATED NONPARTY OR  
NONPARTIES INVOLVED**

**You are instructed to answer the following questions. You must all agree on your answers to each question.**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**2. Do you find that the plaintiff is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)?**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

**If your answer to (both of) (all of) these (number) questions is "no," then your foreperson shall complete only Special Verdict Form A and all jurors must sign it.**

**On the other hand, if your answer to any one or**

more of these (*number*) questions, is “yes,” then you shall answer the following questions:

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (*insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29*)?**

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault.)*

**4. Do you find that the designated nonparty, (*name of first designated nonparty*), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (*insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29*)?**

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

**5. Do you find that the designated nonparty, (*name of second designated nonparty*), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (*insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29*)?**

*(Insert, as above in question 5, but in separately numbered questions, any additional forms of comparative fault.)*

**If your answer to all of these questions numbered (*insert specific numbers of questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties, e.g., 3, 4, etc.*) is “no,” you shall answer the**

following two questions, and then your foreperson shall complete only Special Verdict Form B and all jurors must sign it.

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover.**

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, *(name of first defendant)*; and**
- b. the defendant, *(name of second defendant)*.**

**You must enter the figure of zero, "0," for any defendant you have found was not (negligent) (or) (at fault).**

**On the other hand, if your answer to any one or more of questions numbered *(insert specific numbers of questions relating to the comparative fault of the plaintiff and the designated nonparty or nonparties)* is "yes," you shall answer the following questions, and then your foreperson shall complete only Special Verdict Form C and all jurors must sign it.**

**8. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. *(insert the number assigned in the case to the instruction that sets forth recoverable damages)* that were caused by the combined (negligence) (or) (fault), if any, of:**

- a. the plaintiff; and**



b. all of the defendants from whom the plaintiff is entitled to recover; and

c. (the designated nonparty) (all of the designated nonparties that you have found to be [negligent] [or] [at fault]).

9. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:

a. the plaintiff; and

b. each of the defendants from whom the plaintiff is entitled to recover; and

c. (the designated nonparty) (each of the designated nonparties that you have found to be [negligent] [or] [at fault]).

You must enter the figure of zero, "0," for any party or designated nonparty you have found was not (negligent) (or) (at fault).

#### Notes on Use

For alternative special verdict forms, see Instruction 4:20.

#### Source and Authority

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

**14:33B SPECIAL VERDICT FORMS—NO  
COUNTERCLAIM—MULTIPLE  
DEFENDANTS—DESIGNATED  
NONPARTY OR NONPARTIES  
INVOLVED—FORMS A, B, AND C**

**FORM A**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
Plaintiff,	)	
	)	
v.	)	<b>SPECIAL VERDICT</b>
_____	)	<b>FORM A</b>
Defendant.	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED AND ALL  
JURORS HAVE SIGNED EITHER SPECIAL VERDICT  
FORM B OR SPECIAL VERDICT FORM C.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is en-  
titled to recover damages from the defendant, (name  
of first defendant), on (his) (her) claim of (insert appropri-  
ate description, e.g., "negligence," "breach of the warranty of  
. . . , " etc.), under Instruction No. (insert the number as-  
signed in the case to the instruction that sets forth the basic  
elements of liability for the claim as in Instructions 14:1,  
14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar para-  
graphs so as to include all product liability claims being  
made against the first defendant.)*

(ANSWER: \_\_\_\_\_)

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

(ANSWER: \_\_\_\_\_)

**We, the jury, having answered (both) (all) of these (number) questions "no," find the issues for (both) (all) the defendants, (names).**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Foreperson**

**FORM B**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

\_\_\_\_\_  
**Plaintiff,**

**v.**

\_\_\_\_\_  
**Defendant.**

)  
)  
)  
) **SPECIAL VERDICT**  
) **FORM B**  
)  
)



**DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED AND ALL JURORS HAVE SIGNED EITHER SPECIAL VERDICT FORM A OR SPECIAL VERDICT FORM C.**

**We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of first defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the first defendant.)*

**(ANSWER: \_\_\_\_\_)**

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . . , " etc.) under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

(ANSWER: \_\_\_\_\_)

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

ANSWER: \_\_\_\_\_

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault).*

(ANSWER: \_\_\_\_\_)

**4. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

ANSWER: \_\_\_\_\_

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

(ANSWER: \_\_\_\_\_)

**5. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

ANSWER: \_\_\_\_\_

(Insert, as above in question 5, but in separately numbered questions, any additional forms of comparative fault.)

(ANSWER: \_\_\_\_\_)

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault) of all of the defendants from whom you have found that plaintiff is entitled to recover.**

ANSWER: \$\_\_\_\_\_

**7. Taking as 100 percent the combined (negligence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage was caused by the (negligence) (or) (fault), if any, of:**

- a. the defendant, (name of first defendant); and
- b. the defendant, (name of second defendant).

**You must enter the figure of zero, "0", for any defendant you have found was not (negligent) (or) (at fault).**

ANSWER:

**Percentage, if any, charged to** \_\_\_\_\_%  
**defendant, (name of first**  
*defendant):*

**Percentage, if any, charged to** \_\_\_\_\_%  
**defendant, (name of second**  
*defendant):*

**MUST TOTAL: 100%** \_\_\_\_\_%

\_\_\_\_\_



\_\_\_\_\_  
 \_\_\_\_\_  
**Foreperson**

**FORM C**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
 COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
 Civil Action No. \_\_\_\_\_**

\_\_\_\_\_  
**Plaintiff,**

**v.**

\_\_\_\_\_  
**Defendant.**

)  
 )  
 ) **SPECIAL VERDICT**  
 ) **FORM C**  
 )  
 )

**DO NOT ANSWER THIS SPECIAL VERDICT FORM C  
 IF YOUR FOREPERSON HAS COMPLETED AND ALL  
 JURORS HAVE SIGNED EITHER SPECIAL VERDICT  
 FORM A OR SPECIAL VERDICT FORM B.**

**We, the jury, present our Answers to Questions  
 submitted by the Court, to which we have all agreed:**

**1. Do you find that the plaintiff, (name), is en-  
 titled to recover damages from the defendant, (name  
 of the first defendant), on (his) (her) claim of (insert ap-  
 propriate description, e.g., "negligence," "breach of the war-  
 ranty of . . . ," etc.) under Instruction No. (insert the  
 number assigned in the case to the instruction that sets forth  
 the basic elements of liability for the claim, as in Instruc-  
 tions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes  
 or No)**

**ANSWER: \_\_\_\_\_**

*(Insert additional separately numbered similar para-  
 graphs so as to include all product liability claims being  
 made against the first defendant.)*

(ANSWER: \_\_\_\_\_)

**2. Do you find that the plaintiff, (name), is entitled to recover damages from the defendant, (name of second defendant), on (his) (her) claim of (insert appropriate description, e.g., "negligence," "breach of the warranty of . . .," etc.), under Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of liability for the claim, as in Instructions 14:1, 14:8, 14:10, 14:13, 14:17, 14:20, or 14:22)? (Yes or No)**

ANSWER: \_\_\_\_\_

*(Insert additional separately numbered similar paragraphs so as to include all product liability claims being made against the second defendant.)*

(ANSWER: \_\_\_\_\_)

**3. Do you find that the plaintiff was (negligent) (or) (at fault) in causing (his) (her) own (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

ANSWER: \_\_\_\_\_

*(Insert, as above in question 3, but in separately numbered questions, any additional forms of comparative fault).*

**4. Do you find that the designated nonparty, (name of first designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number of the instruction assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

ANSWER: \_\_\_\_\_

*(Insert, as above in question 4, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**5. Do you find that the designated nonparty, (name of second designated nonparty), was (negligent) (or) (at fault) in causing plaintiff's (injuries) (damages) (losses) as set forth in Instruction No. (insert the number assigned in the case to the instruction that sets forth the basic elements of any form of comparative fault, e.g., as in Instruction 14:28 or 14:29)? (Yes or No)**

**ANSWER: \_\_\_\_\_**

*(Insert, as above in question 5, but in separately numbered questions, any additional forms of comparative fault.)*

**(ANSWER: \_\_\_\_\_)**

**6. State the total amount of plaintiff's (injuries) (damages) (losses) under Instruction No. (insert the number assigned in the case to the instruction that sets forth recoverable damages) that were caused by the combined (negligence) (or) (fault), if any, of:**

- a. the plaintiff, (name); and**
- b. the defendant, (name of first defendant); and**
- c. the defendant, (name of second defendant); and**
- d. the designated nonparty, (name of first designated nonparty); and**
- e. the designated nonparty, (name of second designated nonparty).**

**ANSWER: \$ \_\_\_\_\_**

**7. Taking as 100 percent the combined (negli-**



gence) (or) (fault) that caused the plaintiff's (injuries) (damages) (losses), what percentage, if any, was caused by the (negligence) (or) (fault) of:

- a. the plaintiff, (*name*); and
- b. the defendant, (*name of first defendant*); and
- c. the defendant, (*name of second defendant*); and
- d. the designated nonparty, (*name of first designated nonparty*)(.)(); and
- e. the designated nonparty, [*name of second designated nonparty*]).

You must enter the figure zero, "0," for any party or designated nonparty you have found was not (negligent) (or) (at fault).

ANSWER:

Percentage, if any, charged to \_\_\_\_\_%  
 plaintiff, (*name*):  
 Percentage, if any, charged to \_\_\_\_\_%  
 defendant, (*name of first*  
*defendant*):  
 Percentage, if any, charged to \_\_\_\_\_%  
 defendant, (*name of second*  
*defendant*):  
 Percentage, if any, charged to \_\_\_\_\_%  
 designated nonparty, (*name of*  
*first designated nonparty*):  
 (Percentage, if any, charged to \_\_\_\_\_%  
 designated nonparty, [*name of*  
*second designated nonparty*]:)

MUST TOTAL: 100% \_\_\_\_\_%

_____	_____
_____	_____
_____	_____

Foreperson

Notes on Use

For alternative special verdict forms, see Instruction 4:20.

Source and Authority

This instruction is supported by sections 13-21-406 and 13-21-111.5, C.R.S.

## **CHAPTER 15. PROFESSIONAL LIABILITY**

### **I. PHYSICIANS AND PRACTITIONERS OF OTHER HEALING ARTS**

#### **A. MALPRACTICE**

- 15:1 Elements of Liability
- 15:2 Negligence—Nonspecialist—Defined
- 15:3 Negligence—Specialist or One Who Has or Claims to Have  
Special Skill—Defined
- 15:4 No Implied Warranty of Successful Outcome
- 15:5 Referral of Patient to Another Physician
- 15:6 Contributory Negligence of Patient—Defined

#### **B. BATTERY**

- 15:7 Operation or Treatment Without Consent of Patient
- 15:8 Affirmative Defense—Consent, Express or Implied
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#### **C. UNINFORMED CONSENT**

- 15:10 Uninformed Consent—Elements of Liability
- 15:11 Information Required
- 15:12 Substantial Risk—Defined
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#### **D. DAMAGES INSTRUCTIONS AND SPECIAL VERDICTS IN ACTIONS AGAINST HEALTH CARE PROFESSIONALS OR HEALTH CARE INSTITUTIONS**

- 15:14 Special Verdict—Mechanics for Submitting—Tort Actions  
Against Health Care Professionals or Health Care  
Institutions
- 15:15 Special Verdict Forms—Tort Actions Against Health Care  
Professionals or Health Care Institutions—Forms A and  
B
- 15:16 Determining Present Value of Future Damages
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### **II. ATTORNEYS—MALPRACTICE**

- 15:18 Elements of Liability of Attorneys—Not Involving an  
Underlying Claim or Case
- 15:19 Elements of Liability of Attorneys—Involving an  
Underlying Matter (Case-Within-a-Case)



- 15:20 Elements of Liability of Attorneys—Involving an Underlying Matter (Case-Within-a-Case)—Determining Whether Plaintiff Should Have Prevailed in the Underlying Matter
- 15:21 Negligence—Attorneys—Defined
- 15:22 No Implied Warranty of Successful Outcome
- 15:23 Referral of Client to Another Attorney
- 15:24 Contributory Negligence of Client—Defined

III. OTHER PROFESSIONAL MALPRACTICE (ACCOUNTANTS, ARCHITECTS, ETC.)

- 15:25 Elements of Liability—Accountants, Architects, Etc.
- 15:26 Negligence—Other Professionals—Defined
- 15:27 Causation—Real Estate Brokers—Transactional Malpractice—Defined
- 15:28 No Implied Warranty of Successful Outcome—Other Professionals
- 15:29 Referral of Client to Another Professional Person
- 15:30 Contributory Negligence of Client—Defined

# I. PHYSICIANS AND PRACTITIONERS OF OTHER HEALING ARTS A. MALPRACTICE

## 15:1 ELEMENTS OF LIABILITY

Use Instruction 9:1 or 9:22, whichever is appropriate in light of the evidence in the case.

### Notes on Use

1. When there is sufficient evidence supporting a claim for malpractice based on negligence against a physician or professional practitioner of another healing art, Instruction 9:1 or 9:22 should be given, together with such other instructions contained in Chapters 9 and 15 as would be appropriate in light of the evidence in the case. For example, as to when the doctrine of *res ipsa loquitur* may be applicable in a malpractice case, see the cases cited in the Notes on Use to Instruction 9:17.

2. For the standard of care required of nonspecialists, see the Source and Authority to Instruction 15:2 and, for specialists, see the Source and Authority to Instruction 15:3. See **Dotson v. Bernstein**, 207 P.3d 911, 913 (Colo. App. 2009) (“The distinction between an ordinary negligence claim and a medical negligence claim is that, in the latter, the duty is breached when a physician’s treatment falls below the applicable standard of care.”).

3. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20 (model unified verdict form). For a discussion as to the statutory requirements for designating a nonparty professional at fault in tort litigation, see **Redden v. SCI Colorado Funeral Services, Inc.**, 38 P.3d 75 (Colo. 2001) (interpreting section 13-21-111.5(3)(b) (designation of nonparties), and section 13-20-602, C.R.S. (certificate of review)). See also Source and Authority to Instruction 15:21, notes 2 & 3 (discussing certificate of review).

### Source and Authority

1. This instruction is supported by **Day v. Johnson**, 255 P.3d 1064 (Colo. 2011) (listing the elements of a medical malpractice claim); **HealthONE v. Rodriguez ex rel. Rodriguez**, 50 P.3d 879 (Colo. 2002) (listing the elements of a medical malpractice claim); **Dotson**, 207 P.3d at 913 (listing the elements of a medical malpractice claim).

### Medical Malpractice Claim

2. “A medical malpractice action is a particular type of negligence action.” **Day**, 255 P.3d at 1068 (citing **Greenberg v. Perkins**, 845 P.2d

530 (Colo. 1993)). “Like other negligence actions, the plaintiff must show a legal duty of care on the defendant’s part, breach of that duty, injury to the plaintiff, and that the defendant’s breach caused the plaintiff’s injury.” *Id.* at 1068-69. “The duty of care on which a medical malpractice action is predicated arises out of the professional relationship between physician and patient.” **Greenberg**, 845 P.2d at 534.

3. “To establish a breach of the duty of care in a medical malpractice action, the plaintiff must show that the defendant failed to conform to the standard of care ordinarily possessed and exercised by members of the same school of medicine practiced by the defendant.” **Day**, 255 P.3d at 1069 (citing **Melville v. Southward**, 791 P.2d 383 (Colo. 1990)). “That standard of care is measured by whether a reasonably careful physician of the same school of medicine as the defendant would have acted in the same manner as did the defendant in treating and caring for the patient. Thus, the standard of care for medical malpractice is an objective one.” *Id.* (citing **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Greenberg**, 845 P.2d at 534-35; **Melville**, 791 P.2d at 387); *see also* Notes on Use and Source and Authority to Instructions 15:2 & 15:3.

4. To prove causation in a medical malpractice action, “the plaintiff must show by a preponderance of the evidence that the injury would not have occurred but for the defendant’s negligent conduct.” **Kaiser Found. Health Plan of Colo. v. Sharp**, 741 P.2d 714, 719 (Colo. 1987). “The existence of a causative link between the plaintiff’s injuries and the defendant’s negligence is a question of fact, and it is within the province of the fact-finder to determine the relationship between the defendant’s negligence and the plaintiff’s condition, as long as the evidence establishes such facts and circumstances as would indicate with reasonable probability that causation exists. To create a triable issue of fact regarding causation in a medical malpractice case, the plaintiff need not prove with absolute certainty that the defendant’s conduct caused the plaintiff’s harm, or establish that the defendant’s negligence was the only cause of the injury suffered. However, the plaintiff must establish causation beyond mere possibility or speculation.” *Id.* (citations omitted).

5. The court of appeals is split on whether Colorado allows recovery of damages for increased risk of harm or loss of chance. In **Sharp v. Kaiser Foundation Health Plan of Colorado**, 710 P.2d 1153 (Colo. App. 1985), *aff’d*, 741 P.2d 714 (Colo. 1987), the court of appeals held that damages may be recovered for increased risk of harm or, conversely, the loss of chance for recovery. The court rejected the requirement that a prima facie case requires evidence that the chance of avoiding the harm, absent the defendant’s negligence, was greater than 50%. Although the supreme court affirmed the result, it did so expressly without adopting loss of chance or increased risk of harm theory. **Kaiser Found. Health Plan of Colo.**, 741 P.2d at 718. However, in **Reigel v. SavaSeniorCare L.L.C.**, 292 P.3d 977 (Colo. App. 2011), the court of appeals rejected the increased risk of harm or loss of chance theory of recovery as inconsistent with the requirement that a plaintiff must prove “but-



for” causation and “inconsistent with Colorado Supreme Court precedent.” *Id.* at 987; *see also Lorenzen v. Pinnacol Assurance*, 2019 COA 54, ¶¶ 27–30, 457 P.3d 100 (criticizing the court of appeals’ decision in *Sharp* and explaining that but-for causation is a prerequisite to establishing the substantial factor test).

6. Colorado recognizes a medical malpractice claim for “wrongful pregnancy,” a claim that a physician negligently failed to terminate the mother’s pregnancy. *Dotson*, 207 P.3d at 914 (economic and noneconomic damages, including medical expenses and pain and suffering associated with labor, delivery, and subsequent medical complications from the birth, were recoverable as consequential damages). Colorado also recognizes parents’ medical malpractice claim for “wrongful birth,” a claim that they would not have had the child or would have terminated the pregnancy had they been properly advised of the risks of impairment or birth defects. *Lininger v. Eisenbaum*, 764 P.2d 1202 (Colo. 1988) (entitled to recover those extraordinary medical and education expenses occasioned by the child’s blindness). However, Colorado does not recognize the child’s separate claim for “wrongful life,” a claim brought by an impaired child under the theory that, but for the doctor’s negligence, the child would not have been born to suffer the impairment. *Id.* at 1210.

7. Traditional negligence principles are applicable to “fear of cancer” claims in medical malpractice actions. *Boryla v. Pash*, 960 P.2d 123 (Colo. 1998). In *Boryla*, the plaintiff sought noneconomic damages for emotional distress including the fear of an increased risk of the recurrence of her cancer as a result of her physician’s failure to promptly diagnose her breast cancer. *Id.* at 125. The supreme court stated, “In cases where the plaintiff demonstrates that her cancerous condition physically worsened as a result of the delayed diagnosis, the plaintiff has demonstrated a sufficient physical injury to permit the recovery of emotional distress damages.” *Id.* at 129. Thus, the court concluded that “traditional negligence principles which focus on proximate cause as well as the reasonableness of the plaintiffs fear are sufficient to evaluate fear of cancer claims in medical malpractice claims.” *Id.*

8. In *Danko v. Conyers*, 2018 COA 14, ¶¶ 20–22, 432 P.3d 958, the court of appeals held that a defendant does not have to designate a nonparty under section 13-21-111.5(3)(b) to assert a causation defense that someone else’s action or inaction was the sole cause of the injury. Specifically, a “defendant may always attempt to interpose a complete defense that his acts or omissions were not the cause of the plaintiff’s injuries” because “[a] defense that the defendant did not cause the plaintiff’s injuries is not equivalent to the designation of a non-party because it cannot result in apportionment of liability, but rather is a complete defense if successful.” *Id.* at ¶ 21 (quoting *Redden*, 38 P.3d at 81). However, under RESTATEMENT (SECOND) OF TORTS § 457 (1965), an original tortfeasor is liable for any additional bodily harm caused by subsequent medical care reasonably required by the original injury, regardless of whether the subsequent medical care was done properly or

negligently. **Danko**, ¶¶ 27–30, 432 P.3d at 964; *see also* **Union Supply Co. v. Pust**, 196 Colo. 162, 583 P.2d 276 (1978); **Powell v. Brady**, 30 Colo. App. 406, 496 P.2d 328, (1972), *aff'd sub nom. Brady v. City & Cty. of Denver*, 181 Colo. 218, 508 P.2d 1254 (1973). The only exception is if the subsequent medical care constitutes extraordinary misconduct or supervening cause. **Danko**, ¶ 31, 432 P.3d at 965.

### **Expert Testimony**

9. “Unless the subject matter of a medical malpractice action lies within the ambit of common knowledge or experience of ordinary persons, the plaintiff must establish the controlling standard of care, as well as the defendant’s failure to adhere to that standard, by expert opinion testimony.” **Melville**, 791 P.2d at 387. “The reason for the requirement of expert opinion testimony in most medical malpractice cases is obvious: matters relating to medical diagnosis and treatment ordinarily involve a level of technical knowledge and skill beyond the realm of lay knowledge and experience. Without expert opinion testimony in such cases, the trier of fact would be left with no standard at all against which to evaluate the defendant’s conduct.” *Id.*; *see, e.g.*, **Gorab**, 943 P.2d at 427 (requiring expert testimony to lack of informed consent cases); **Espander v. Cramer**, 903 P.2d 1171, 1174 (Colo. App. 1995) (“even the determination whether the consent given [by a patient] was misinformed or given on the basis of incomplete or misleading disclosure concerning the degree of risk would require expert testimony”); **Greene v. Thomas**, 662 P.2d 491 (Colo. App. 1982) (expert testimony required to prove that a physician did not properly perform surgery); **Smith v. Curran**, 28 Colo. App. 358, 472 P.2d 769 (1970) (expert testimony required to prove the causes of infection or its source).

10. Similarly, expert testimony is generally required to prove causation in medical malpractice cases. **Conrad v. Imatani**, 724 P.2d 89 (Colo. App. 1986) (granting defendant summary judgment on medical malpractice negligence claim because plaintiff failed to present any expert testimony that her pain was caused by defendant’s negligence); **Smith**, 28 Colo. App. at 363, 472 P.2d at 770-71 (upholding directed verdict for defendant in medical malpractice case where plaintiff failed to present any expert testimony on issue of the cause or source of a post-operative infection, because those “are matters within the field of medical experts”); **Williams v. Boyle**, 72 P.3d 392, 398 (Colo. App. 2003) (concluding expert testimony was necessary to establish that prescribed medication caused plaintiff’s kidney damage, because “relationship between the kidney damage and the prescribed medication is not so clear that a lay person would be able to conclude that the medication caused the damage without expert testimony”).

11. The Health Care Availability Act includes a statute governing the qualification of expert witnesses. Section 13-64-401, C.R.S. provides that in any medical malpractice action against a physician, no person shall be qualified to testify as an expert witness concerning issues of



negligence unless he or she is not only is a licensed physician but can demonstrate that he or she has a substantial familiarity with applicable standards of care and practice that are the subject matter of the action. "The court shall not permit an expert in one medical subspecialty to testify against a physician in another medical subspecialty unless, in addition to such a showing of substantial familiarity, there is a showing that the standards of care and practice in the two fields are similar." *Id.*; see **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008). However, these limitations do not apply to expert witnesses testifying as to the degree or permanency of medical or physical impairment. § 13-64-401.

### **Certificate of Review**

12. A certificate of review is required in all professional negligence cases where expert testimony is required to establish a prima facie cause of action. **Martinez v. Badis**, 842 P.2d 245 (Colo. 1992). A certificate of review is required for a lack of informed consent claim. **Williams**, 72 P.3d at 396; **Esponder**, 903 P.2d at 1174. Similarly, a medical malpractice claim based upon the statute for deceptive trade practices requires a certificate of review. **Teiken v. Reynolds**, 904 P.2d 1387 (Colo. App. 1995); **Williams**, 72 P.3d at 399-401 (requiring a certificate of review for fraudulent nondisclosure, fraudulent misrepresentation, and defamation claims against a physician). However, a certificate is not necessary if the case is one that does not require expert testimony, such as a negligence claim based upon *res ipsa loquitur*. **Shelton v. Penrose/St. Francis Healthcare System**, 984 P.2d 623 (Colo. 1999); **Bilawsky v. Faseehudin**, 916 P.2d 586 (Colo. App. 1995).

13. Section 13-20-602(1), C.R.S. requires a plaintiff to file a certificate of review within sixty days of the service of the complaint. **Shelton**, 984 P.2d at 626; **Yadon v. Southward**, 64 P.3d 909 (Colo. App. 2002) (finding that the certificate of review statute applies to pro se plaintiffs as well as plaintiffs represented by counsel). The certificate must include a declaration by the plaintiff's attorney that he or she consulted with an appropriately licensed and qualified medical professional who, after reviewing relevant known facts, concluded that the claim "does not lack substantial justification." § 13-20-602(3)(a)(II); see **Redden**, 38 P.3d at 82; **Teiken**, 904 P.2d at 1388-89. When a certificate of review is required, the failure to file one in accordance with the statute requires dismissal of the complaint. § 13-20-602(4); **Giron v. Koktavy**, 124 P.3d 821 (Colo. App. 2005).

14. If a party wishes to file a certificate of review beyond the 60-day time period, good cause must be established for the late filing. § 13-20-602(1)(a). In determining whether good cause has been shown, the court must consider the following: (1) whether the neglect that resulted in the failure to file was excusable; (2) whether the moving party alleged a meritorious defense or claim; and (3) whether relief from the challenged order would be consistent with equitable considerations, such as whether any prejudice would accrue to the nonmoving party. **RMB Servs., Inc. v. Truhlar**, 151 P.3d 673 (Colo. App. 2006); **Ehrlich**



**Feedlot, Inc. v. Oldenburg**, 140 P.3d 265 (Colo. App. 2006); **Williams**, 72 P.3d at 396. Although a court may decline to accept a late certificate if the plaintiff fails to satisfy any of these three criteria, the court must consider all of them because evidence relating to one factor might shed light upon another. **RMB Servs., Inc.**, 151 P.3d at 676; **Yadon**, 64 P.3d at 913. In determining whether good cause exists, the court should be guided by the general rule favoring resolution of disputes on their merits. **RMB Servs., Inc.**, 151 P.3d at 676.

### **Corporate Practice of Medicine**

15. The corporate practice of medicine doctrine is a common law principle that recognizes “it is impossible for a fictional entity, a corporation, to perform medical actions or be licensed to practice medicine.” **Estate of Harper v. Denver Health & Hosp. Auth.**, 140 P.3d 273, 275 (Colo. App. 2006) (quoting **Pediatric Neurosurgery, P.C. v. Russell**, 44 P.3d 1063, 1067 (Colo. 2002)). Under this doctrine, a corporation may not practice medicine or interfere with a physician’s independent medical judgment. *Id.*; **Lufti v. Brighton Cmty. Hosp. Ass’n**, 40 P.3d 51 (Colo. App. 2001); *see also* §§ 12-36-134(7), 25-3-103.7, C.R.S. Thus, entities such as hospitals or other medical facilities cannot be held liable for a doctor’s negligence based on respondeat superior. **Hall**, 190 P.3d at 861 (discussing policy considerations underlying prohibition); **Villalpando v. Denver Health & Hosp. Auth.**, 181 P.3d 357 (Colo. App. 2007) (hospital); **Estate of Harper**, 140 P.3d at 278 (hospital); **Daly v. Aspen Ctr. for Women’s Health, Inc.**, 134 P.3d 450 (Colo. App. 2005) (corporate midwife facility). However, the doctrine has not been extended to bar a hospital’s vicarious liability for the negligence of “other employees, such as nurses.” **Nieto v. State**, 952 P.2d 834, 840-41 (Colo. App. 1997) (citing **Bernardi v. Cmty. Hosp. Ass’n**, 166 Colo. 280, 443 P.2d 708 (1968)), *aff’d in part, rev’d in part on other grounds*, 993 P.2d 493 (Colo. 2000).

16. Applying the corporate practice of medicine doctrine, the court of appeals held that an ambulatory surgical center cannot be directly liable for failing to protect a patient from the treating physician’s negligence in selecting a certain drug for treatment. **Smith v. Surgery Center at Lone Tree, LLC**, 2020 COA 145M, ¶ 24, 484 P.3d 745. The court reasoned that a health care facility’s supervisory authority over its staff does not extend to physicians, whether or not the facility employs them. *Id.* at ¶ 19, 484 P.3d at 751. Because a facility “may not dictate to a physician how he or she may practice medicine, it likewise may not be held liable for lapses in a physician’s professional judgment.” *Id.* The only exception to this general rule is in the form of a negligent credentialing claim. *Id.* at ¶ 20.

17. The supreme court interpreted section 12-36-134 to create an exception to the common-law rule by allowing doctors to form professional service corporations for the practice of medicine. **Russell**, 44 P.3d at 1067–71. However, by expressly disagreeing with that opinion and revising the statute to assure that professional service corporations

“shall not practice medicine,” the legislature has decided that a physician’s employment under the statute is “not [to] be considered the corporate practice of medicine.” § 12-36-134(7), C.R.S. See **Estate of Harper**, 140 P.3d at 276 (interpreting statute). Nor does the Governmental Immunity Act’s provision that a public entity is responsible for paying costs, judgments, and settlements of its public employees, § 24-10-110(1)(a), C.R.S., create any statutory exception to the doctrine. **Villalpando**, 181 P.3d at 364.

### **Captain of the Ship**

18. “The captain of the ship doctrine, which is grounded in respondeat superior, imposes vicarious liability on a surgeon for the negligence of hospital employees under the surgeon’s control and supervision during surgery.” **Ochoa v. Vered**, 212 P.3d 963, 966 (Colo. App. 2009) (citing **Beadles v. Metayka**, 135 Colo. 366, 370-71, 311 P.2d 711, 713-14 (1957); **Young v. Carpenter**, 694 P.2d 861 (Colo. App. 1984)). “A licensed physician is the principal or master while performing medical services within a hospital, rather than an agent or a servant.” **O’Connell v. Biomet, Inc.**, 250 P.3d 1278, 1283 (Colo. App. 2010). Thus, hospital personnel assisting under the physician’s control and supervision “are borrowed servants, and the physician is liable for their acts of negligence.” *Id.* In those cases, use the instructions from Chapter 8 (liability based on agency and respondeat superior) that are appropriate based on the facts. See **Ochoa**, 212 P.3d at 967 (citing this note on use and approving prior version of Instruction 8:21 (formerly Instruction 8:2)).

19. The captain of the ship doctrine has been limited to medical care in the operating room. See **Settle v. Basinger**, 2013 COA 18, ¶ 44, 411 P.3d 717, 725 (observing that “no Colorado appellate court has applied the captain of the ship doctrine to render a non-surgeon vicariously liable for the negligence of another providing medical care outside an operating room”); **Colo. Med. Soc. v. Hickenlooper**, 2012 COA 121, ¶ 53, 353 P.3d 396, 404 (noting that the captain of the ship doctrine “only applies when the surgeon has the right to supervise and control other personnel who are present in the operating room”), *aff’d on other grounds*, 2015 CO 41, 349 P.3d 1133; **O’Connell**, 250 P.3d at 1283 (doctrine is not limited to hospital employees and applies to nonmedical persons in operating room); **Nieto**, 952 P.2d at 840-41 (hospital liable for negligence of nurse where “captain of the ship” doctrine not applicable); **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992) (trial court properly rejected a “captain of the ship” instruction where there was no evidence of negligence by hospital employees under the defendant doctor’s supervision nor evidence that doctor was negligent in the selection or supervision of assistants); **Krane v. Saint Anthony Hosp. Sys.**, 738 P.2d 75 (Colo. App. 1987) (hospital as employer not liable for negligence of nurse while nurse acting under operating surgeon’s supervision in operating room).

### **Joint and Several Liability**

20. Section 13-21-111.5, which abolished the common law rule of



joint and several liability, was enacted in Colorado in 1986 as part of comprehensive tort reform. Its adoption had “the effect of eliminating liability of a physician for the negligent acts of another physician absent a showing that the physicians ‘acted in concert,’ as provided in § 13-21-111.5(4), or that the physicians were in an employment, partnership, or joint venture relationship with one another.” **Freyer v. Albin**, 5 P.3d 329, 331 (Colo. App. 1999). If the plaintiff is claiming that the defendant and the “actively” negligent physician had a relationship that would support vicarious liability on one of these other bases, e.g., a partnership, use the appropriate instructions from Chapters 7 or 8. *See Hall*, 190 P.3d at 860 (where evidence is sufficient to establish agency relationship between surgeon or “attending physician” and his colleague, as “cover physician,” rejecting argument that former could not be vicariously liable for latter).

### **Statutory Duty/Immunity**

21. The Colorado Professional Review Act, §§ 12-36.5-101 to -203, C.R.S., immunizes hospitals and health care facilities that comply with the Act “from damages in any civil action brought against [them] with respect to [their] participation in a professional peer review proceeding.” **Kauntz v. HCA-HealthONE, LLC**, 174 P.3d 813, 817 (Colo. App. 2007); *see* § 12-36.5-203(1), C.R.S. However, the Professional Review Act no longer bars an action against hospitals and health care facilities credentialing a physician who is alleged to have been negligent in performing a medical procedure. **Hickman v. Catholic Health Initiatives**, 2013 COA 129, ¶ 1, 328 P.3d 266. Specifically, the 2012 amendment provides: “[N]othing in this article relieves . . . a health care facility licensed or certified pursuant to [the Act] of liability to an injured person or wrongful death claimant for the facility’s independent negligence in the credentialing or privileging process for a person licensed [under the Act].” § 12-36.5-203(2)(a).

22. For a discussion as to the duty of a mental health care provider to warn against violent behavior of a mental health patient, *see McCarty v. Kaiser-Hill Co.*, 15 P.3d 1122 (Colo. App. 2000); **Sheron v. Lutheran Medical Center**, 18 P.3d 796 (Colo. App. 2000); and **Halverson v. Pikes Peak Family Counseling & Mental Health Center, Inc.**, 795 P.2d 1352 (Colo. App. 1990). *See also Halverson v. Pikes Peak Family Counseling & Mental Health Ctr., Inc.*, 851 P.2d 233 (Colo. App. 1992) (construing section 13-21-117, C.R.S.).

23. Physicians and other healthcare professionals, inter alia, who also have a duty to report suspected child abuse or neglect to local authorities, § 19-3-304(1), C.R.S., are entitled to immunity from liability for any good-faith participation in providing those reports, § 19-3-309, C.R.S.; **Credit Serv. Co. v. Dauwe**, 134 P.3d 444 (Colo. App. 2005); **Montoya v. Bebensee**, 761 P.2d 285 (Colo. App. 1988), unless the plaintiff presents evidence that would show that the defendant’s conduct was “willful, wanton, and malicious.” § 19-3-309; **Dauwe**, 134 P.3d at 447; *see Montoya*, 761 P.2d at 289 (decided under prior statute); **Martin v. Weld County**, 43 Colo. App. 49, 598 P.2d 532 (1979).



24. Under the Good Samaritan statute, a physician, a surgeon, or any other person who in good faith renders emergency care or assistance without compensation at the scene of an emergency or accident is not liable for damages resulting from any good faith act or omission. § 13-21-108(1), C.R.S. However, it does not apply to “any person who renders such emergency care or emergency assistance to a patient he or she is otherwise obligated to cover.” *Id.* This immunity extends to employers of such “Good Samaritans,” as long as the care in question was provided during the course of the employee’s employment and the employee was personally exempt under the statute. § 13-21-108(5). Similarly, those health-care providers who provide emergency care or emergency assistance to individuals who need it and who are engaged in a competitive sport have the same type of immunity. § 13-21-108.2, C.R.S.

25. Under the Volunteer Service Act, any volunteer, including a licensed physician, a licensed physician assistant, a licensed anesthesiologist assistant, a licensed nurse, a registered advance practice nurse, a certified nurse aide, or other health care professional designated in the Act, who offers medical care or treatment as a volunteer for a non-profit organization, a nonprofit corporation, a governmental entity, or a hospital has immunity from civil liability if: (I) the volunteer is immune from liability for the act or omission under the federal “Volunteer Protection Act of 1997,” as from time to time may be amended, codified at 42 U.S.C. § 14501 to -505 (2018); and (II) the damage or injury was not caused by misconduct or other circumstances that would preclude immunity for such volunteer under the federal law. § 13-21-115.5(4), C.R.S. Additionally, a nonprofit organization, nonprofit corporation, governmental entity, or hospital that is formed for the sole purpose of facilitating the volunteer provision of health care is immune from liability arising out of an act or omission of a volunteer who is immune from liability. § 13-21-115.5(4)(b)(II).

26. Health-care professionals and institutions cannot be liable for birth-related injuries or injuries resulting from genetic disease or disorder, or other natural causes, that could not have been prevented or avoided by the exercise of ordinary care. § 13-64-502(1), C.R.S.

27. State and federal regulations that establish the framework for licensing ambulatory surgical centers and Medicare reimbursement cannot be used as a basis for a negligence per se claim because they were not primarily enacted to protect patient safety. **Smith**, 2020 COA 145M, ¶ 49, 484 P.3d at 756.

**15:2 NEGLIGENCE—NONSPECIALIST—DEFINED**

A physician is negligent when the physician (does an act that reasonably careful physicians would not do) (or) (fails to do an act that reasonably careful physicians would do).

To determine whether a physician's conduct was negligent, you must compare that conduct with what a physician having and using the knowledge and skill of physicians practicing in the same field of practice, in the same or similar locality, at the same time, would or would not have done under the same or similar circumstances.

**Notes on Use**

1. See Notes on Use to Instruction 15:1. Use whichever parenthesized words are appropriate.

2. This instruction is generally applicable to members of other healing arts. In such cases, a more appropriate word describing the defendant's profession, e.g., "surgeon," "dentist," "chiropractor," should be substituted for the word "physician." For the standard of care required of practitioners of professions other than the healing arts, see Instructions 15:18 and 15:25.

3. If there is a dispute as to which standard — the "local" standard of this instruction or the "specialty" standard of Instruction 15:3 — is applicable, and there is sufficient evidence supporting each, both instructions should be given with appropriate modifications being made if necessary to avoid confusion for the jury. **Short v. Kinkade**, 685 P.2d 210 (Colo. App. 1983); see **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008). *But see* **Jordan v. Bogner**, 844 P.2d 664 (Colo. 1993) (error to give local standard instruction if undisputed evidence established that defendant physician was a specialist in family practice).

4. This instruction applies only if the standard of care applicable to the allegedly negligent act is a professional one. *See, e.g.,* **Myers v. Woodall**, 42 Colo. App. 44, 592 P.2d 1343 (1978); *see also* **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001) (claims against a professional that do not allege any type of professional negligence do not fall under the certificate of review statute, § 13-20-602, C.R.S., and do not require standard of care to be established by expert testimony).

5. If there is competent expert testimony indicating that the standard of care established or accepted by the relevant community is itself



deficient, this instruction must be modified to inform the jury that evidence of the physician's compliance with the community standard of care is some evidence that the physician was not negligent, but is not conclusive proof of his or her exercise of due care. **United Blood Servs., Inc. v. Quintana**, 827 P.2d 509 (Colo. 1992).

6. As to the personal or vicarious liability of a "licensed physician, nurse, prehospital emergency medical personnel, or health care institution . . . for any act or omission resulting from the administration of services by a [direct-entry midwifery] registrant," see section 12-37-109(1)(a), C.R.S. When, in light of the evidence in the case, provisions of this section might be applicable, this instruction must be appropriately modified, or one or more instructions based on section 12-37-109(1)(a) should be given.

### Source and Authority

1. This instruction is supported by **Larson v. Lindahl**, 167 Colo. 409, 450 P.2d 77 (1968) (physician properly found negligent on basis of "community" standard); **Klimkiewicz v. Karnick**, 150 Colo. 267, 372 P.2d 736 (1962) (chiropractor); **Foose v. Haymond**, 135 Colo. 275, 310 P.2d 722 (1957) (physician); **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934) (dentist); and **Caro v. Bumpus**, 30 Colo. App. 144, 491 P.2d 606 (1971) ("same field of practice" rule applied). *See also* **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997) (discussing negligence of physician); **Melville v. Southward**, 791 P.2d 383 (Colo. 1990) (podiatrist; qualifications of an expert witness trained in one "school" or field of practice to testify as to the standards of another); **Hall**, 190 P.3d at 858-59 (discussing appropriateness of allowing expert physicians in various specialties to testify as to general standard of care common to medical profession and applicable to any physician or fourth-year medical student); **Tracz v. Charter Centennial Peaks Behavioral Health Sys., Inc.**, 9 P.3d 1168 (Colo. App. 2000) (psychiatrist); **DeCordova v. State**, 878 P.2d 73 (Colo. App. 1994) (discussing the "reasonably careful pharmacist" standard); **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992); **Short v. Downs**, 36 Colo. App. 109, 537 P.2d 754 (1975).

2. For a discussion as to the duty of a physician retained by the defendant in a personal injury action to use due care in subjecting the plaintiff to medical tests, see **Greenberg v. Perkins**, 845 P.2d 530 (Colo. 1993). *See also* **Slack v. Farmers Ins. Exch.**, 5 P.3d 280 (Colo. 2000); **Martinez v. Lewis**, 969 P.2d 213 (Colo. 1998) (physician retained by insurer to conduct medical examination of insured owed no duty of care to insured to use reasonable care in preparing and making report to insurer regarding insured's medical condition); **Dalton v. Miller**, 984 P.2d 666 (Colo. App. 1999).



### 15:3 NEGLIGENCE—SPECIALIST OR ONE WHO HAS OR CLAIMS TO HAVE SPECIAL SKILL—DEFINED

A physician (who holds himself or herself out as a specialist in a particular field of medicine) (or) ([who has] [or] [who holds himself or herself out as having] special skill and knowledge to perform a particular [diagnosis] [operation] [treatment] [or] [procedure]) is negligent if that physician (does an act that reasonably careful physicians [acting as such specialists] [or] [possessing such special skill and knowledge] would not do) (or) (fails to do an act that reasonably careful physicians [acting as such specialists] [or] [possessing such special skill and knowledge] would do).

To determine whether such a physician's conduct was negligent, you must compare that conduct with what a physician having and using the knowledge and skill of physicians (practicing in the same specialty) (or) ([who have] [or] [who hold themselves out as having] the same special skill and knowledge), at the same time, would or would not have done under the same or similar circumstances.

#### Notes on Use

1. Use whichever parenthesized and bracketed words and phrases are appropriate, and substitute other words, e.g., “dentist” for “physician” and “field of dentistry” for “field of medicine,” if appropriate.

2. This instruction should be used rather than Instruction 15:2 when (1) the defendant has held himself or herself out as being a specialist in an area commonly recognized as such in his or her profession, or (2) the defendant has held him or herself out as having special skill and knowledge not commonly possessed by others in his or her profession, or (3) there is sufficient evidence that the defendant did in fact have that special skill or knowledge. **Hall v. Frankel**, 190 P.3d 852 (Colo. App. 2008). If there is a dispute as to which standard—the “local” standard of 15:2 or the “specialty” standard of this instruction—is applicable, and there is sufficient evidence supporting each, both instructions should be given, with appropriate modifications being made, if necessary, to avoid confusion for the jury. **Gambrell v. Ravin**, 764 P.2d 362 (Colo. App. 1988), *aff'd on other grounds*, 788 P.2d 817 (Colo. 1990);

**Short v. Kinkade**, 685 P.2d 210 (Colo. App. 1983); *see* **Hall**, 190 P.3d at 858 (although trial court allowed experts in various specialties to testify as to general standard of care for matters common to medical profession, it properly instructed jury under Instruction 15:3, and surgeon could not have been prejudiced if jury held him to less stringent standard of care). *But see* **Jordan v. Bogner**, 844 P.2d 664 (Colo. 1993) (error to give local standard instruction if undisputed evidence established that defendant physician was a specialist in family practice).

3. If there is competent expert testimony indicating that the standard of care established or accepted by the relevant community is itself deficient, this instruction must be modified to inform the jury that evidence of the specialist's compliance with the community standard of care is some evidence that the physician was not negligent, but is not conclusive proof of his or her exercise of due care. **United Blood Servs., Inc. v. Quintana**, 827 P.2d 509 (Colo. 1992).

### Source and Authority

1. This instruction is supported by **Short**, 685 P.2d at 212; and **Greene v. Thomas**, 662 P.2d 491 (Colo. App. 1982) (in malpractice action against specialist plaintiff must prove defendant failed to meet the standard of care of physicians practicing in same specialty). *See also* **Jordan**, 844 P.2d at 667–68; **Hall**, 190 P.3d at 858; **Spoor v. Serota**, 852 P.2d 1292 (Colo. App. 1992); **Songer v. Bowman**, 804 P.2d 261 (Colo. App. 1990) (specialist is required to exercise degree of care and to possess degree of knowledge and skill ordinarily possessed by persons practicing within that specialty), *overruled on other grounds by* **People v. Ramirez**, 155 P.3d 371 (Colo. 2007); RESTATEMENT (SECOND) OF TORTS § 299A cmt. d (1965).

2. This instruction is also impliedly supported by several other Colorado cases. *See, e.g.,* **Artist v. Butterweck**, 162 Colo. 365, 426 P.2d 559 (1967); **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934); **Bonnet v. Foote**, 47 Colo. 282, 107 P. 252 (1910).

3. The generally accepted standard of care by a specialist cannot be determined simply by counting how many physicians follow a particular practice. **State Bd. of Med. Exam'rs v. McCroskey**, 880 P.2d 1188 (Colo. 1994); **Wallbank v. Rothenberg**, 74 P.3d 413 (Colo. App. 2003). Nor may the relevant standard of care be established by testimony concerning the personal practices of expert witnesses. **Wallbank**, 74 P.3d at 416 (after expert testifies concerning standard of care, testimony regarding that expert's personal practices may then help jurors understand why that standard of care is followed by that expert or others).

## 15:4 NO IMPLIED WARRANTY OF SUCCESSFUL OUTCOME

(Unless a [physician] [nurse] states or agrees otherwise, a) (A) [physician] [nurse] does not guarantee or promise a successful outcome by simply treating or agreeing to treat a patient.

(An unsuccessful outcome does not, by itself, mean that a [physician] [nurse] was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that a [physician] [nurse] was negligent.)

### Notes on Use

1. The Notes on Use to Instructions 15:1 and 15:2 are also applicable to this instruction.

2. This cautionary instruction should be given in conjunction with Instruction 15:2 or 15:3 when the evidence of malpractice includes an unsuccessful outcome. **Schuessler v. Wolter**, 2012 COA 86, ¶¶ 8, 28, 310 P.3d 151 (rejecting claim that instruction simply creates rebuttable presumption).

3. This instruction, in the discretion of the trial court, may be applied to nurses. In such circumstances, the bracketed word “nurse” should be used. **Gasteazoro ex rel. Eder v. Catholic Health Initiatives Colo.**, 2014 COA 134, ¶ 35, 408 P.3d 874.

4. Use whichever parenthesized words are appropriate. Omit the first parenthesized clause unless there has been some evidence that the defendant may have so stated or agreed. If there is sufficient evidence that the defendant may have warranted or promised a cure, instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, for example, negligent malpractice or battery, depending on the evidence in the case.

### Source and Authority

This instruction is supported by **Day v. Johnson**, 255 P.3d 1064 (Colo. 2011) (supporting third parenthetical phrase of instruction); **Brown v. Hughes**, 94 Colo. 295, 30 P.2d 259 (1934); **Locke v. Van Wyke**, 91 Colo. 14, 11 P.2d 563 (1932) (supporting first and second parenthetical phrases of instruction); **Craghead v. McCullough**, 58 Colo. 485, 146 P. 235 (1915); **Bonnet v. Foote**, 47 Colo. 282, 107 P. 252 (1910); **Schuessler**, 2012 COA 86, ¶ 29 (supporting second parenthetical phrase of instruction).



cal phrase of instruction); **Gasteazoro ex rel. Eder v. Catholic Health Initiatives Colo.**, 2014 COA 134, ¶ 35 (supporting a modified instruction that includes nurses).

## 15:5 REFERRAL OF PATIENT TO ANOTHER PHYSICIAN

A (physician) (surgeon) who refers a patient to another (physician) (surgeon) for (*insert appropriate description, e.g., “diagnosis,” “treatment,” “care,” etc.*) is not responsible for any negligence on the part of the other (physician) (surgeon). A referring (physician) (surgeon) who fails to exercise reasonable care in selecting the other (physician) (surgeon) may be held responsible for (his) (her) own negligence.

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction should not be given, or must be appropriately modified, if there is a basis in the evidence in the case for imposing vicarious liability on the professional person because the other professional person is an agent, employee, or partner. *See Hall v. Frankel*, 190 P.3d 852 (Colo. App. 2008) (where evidence was sufficient to establish agency relationship, attending surgeon could be held vicariously liable for his negligent colleague who covered for him).
3. If there is any other personal basis for imposing liability on the professional person making the reference, such as personal negligence in giving incorrect information to the other professional person, this instruction must also be appropriately modified.
4. This instruction, with any necessary modifications, may also be applicable in uninformed consent cases (Instruction 15:10).
5. In cases alleging a negligent referral, use Instruction 9:1 or 9:22.

### Source and Authority

There appear to be no Colorado cases specifically establishing the rule stated in this instruction. There are, however, cases from other jurisdictions that do so. *See* W.R. Habeeb, Annotation, *Liability of One Physician or Surgeon for Malpractice of Another*, 85 A.L.R.2d 889 (1962); *see also* Source and Authority to Instruction 15:1.

## 15:6 CONTRIBUTORY NEGLIGENCE OF PATIENT—DEFINED

**A patient is negligent when the patient fails to do an act that a reasonably careful person would do or does an act that a reasonably careful person would not do under the same or similar circumstances to protect himself or herself from (new) (or) (additional) (injuries) (damages) (losses).**

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. When there is sufficient evidence that a patient may have been negligent, but negligent only with regard to the services being rendered by the defendant, for example, the failure of a patient to follow a physician's advice, then this instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:22. On the other hand, if there is sufficient evidence of the plaintiff's possible contributory negligence relating to other matters, then Instruction 9:6, rather than this instruction, should be used in conjunction with Instruction 9:22.
3. In some cases, it may be difficult to determine whether a failure on a plaintiff's part to do something in relation to the plaintiff's treatment should be viewed as a matter of contributory negligence, to be governed by this instruction, Instruction 9:22, and the appropriate comparative negligence instructions in Chapter 9, or as a matter of failure to mitigate damages, to be governed by Instruction 5:2. If necessary, the court by special instructions or through the use of special interrogatories should identify the specific damages being claimed by the plaintiff that may be subject to the rules of comparative negligence and those that may be subject to the rules of mitigation of damages. In general, mitigation relates to additional damages that are caused by the failure of the plaintiff to take reasonable steps to minimize or reduce the extent of damages caused by a prior-occurring negligent act of another. *See* Instruction 5:2. Contributory negligence, on the other hand, usually means negligent conduct on the plaintiff's part that joins with the defendant's negligent conduct to cause the plaintiff's initial injuries or that joins with the defendant's subsequent negligent conduct to increase the plaintiff's injuries. *See* Instruction 9:6.
4. The defense of comparative negligence is not available when the allegedly negligent conduct of the patient created the need for medical treatment in the first place, but did not contribute to the injuries directly resulting from the negligent medical treatment itself. **Kildahl v. Tagge**, 942 P.2d 1283 (Colo. App. 1996).
5. The defense of comparative negligence is not available when a



patient attempts to commit suicide at a secure psychiatric unit because the hospital, by admitting a known suicidal patient to an inpatient psychiatric unit, assumed an affirmative duty to prevent the patient's self-destructive behavior and that duty subsumed the patient's own duty of self-care. **P.W. v. Children's Hosp. Colo.**, 2016 CO 6, ¶ 25, 364 P.3d 891. The court cautioned that the "holding is limited by the factual situation presented here" where the hospital had knowledge that the patient was actively suicidal and, with this knowledge, the hospital admitted the patient to its secure mental health unit and placed him under "high suicide precautions" for the purpose of preventing the patient from attempting suicide. *Id.* at ¶ 27. *But see* **Sheron v. Lutheran Med. Ctr.**, 18 P.3d 796 (Colo. App. 2000) (patient who is treated by health care providers at the hospital for suicidal ideations, and who later commits suicide a day after being discharged from the hospital may be found comparatively negligent).

### Source and Authority

This instruction is supported by **Sheron**, 18 P.3d at 799; **Songer v. Bowman**, 804 P.2d 261 (Colo. App. 1990), *overruled on other grounds by* **People v. Ramirez**, 155 P.3d 371 (Colo. 2007); and **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988). *See also* **Hanley v. Spencer**, 108 Colo. 184, 115 P.2d 399 (1941); Source and Authority to Instruction 9:6. For a discussion of the failure of a patient to follow a physician's advice as constituting contributory negligence, see **McGraw v. Kerr**, 23 Colo. App. 163, 128 P. 870 (1912). *See also* **Hanley**, 108 Colo. at 187, 115 P.2d at 400; **Pearson v. Norman**, 106 Colo. 396, 106 P.2d 361 (1940); **Sheron**, 18 P.3d at 801.

**B. BATTERY****15:7 OPERATION OR TREATMENT WITHOUT  
CONSENT OF PATIENT**

Unless the patient consents, any (operation on) (or) (procedure involving contact with) a patient's body is a battery, even when appropriate skill is used in the (operation) (procedure) (or) (treatment).

(If a patient consents to a certain [operation] [procedure] [or] [treatment], and the physician performs a different [operation] [procedure] [or] [treatment] without the patient's consent, the physician commits a battery and is responsible to the patient for the damages, if any, caused by the [operation] [procedure] [or] [treatment]).

**Notes on Use**

1. "The law in Colorado distinguishes between an action based on no consent (battery) [Instructions 15:7-15:9] and one based on lack of informed consent [Instructions 15:10-15:13]." **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo. App. 1983), *rev'd on other grounds*, 704 P.2d 317 (Colo. 1985); *see also* **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995). Consequently, if the plaintiff is making a claim only on the basis of the lack of "informed consent," the instructions in subpart C of this Part I should be used rather than this instruction. If the plaintiff is making a claim on the basis of no consent as well as one based on lack of "informed consent" (and there is sufficient evidence supporting each claim), the instructions in subpart C of this Part I should be given as well as this instruction.

2. Note 2 of the Notes on Use to Instruction 15:2 is also applicable to this instruction.

3. When an emergency is asserted, and there is sufficient evidence to support it, Instruction 15:9 should also be given with this instruction.

4. Use whichever parenthesized words are appropriate. Omit all parenthesized or bracketed portions of this instruction, including the entire second paragraph, if inapplicable.

5. This instruction must be appropriately modified in situations covered by section 13-21-108, C.R.S. ("Good Samaritan" statute), or other similar statutes.

**Source and Authority**

This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907

(Colo. 1982); **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954); and **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995).



## 15:8 AFFIRMATIVE DEFENSE—CONSENT, EXPRESS OR IMPLIED

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of battery if the affirmative defense of consent is proved. This defense is proved if you find the plaintiff gave express or implied consent to the (operation) (treatment) that was performed.

Express consent may be given orally or in writing. Implied consent means words or conduct of the plaintiff that led the defendant reasonably to believe that the plaintiff was consenting to the (operation) (treatment).

### Notes on Use

1. In certain cases involving minors, see §§ 13-22-101 to -106, 13-20-403, C.R.S., this instruction may require modifications.
2. Use whichever parenthesized words or phrases are appropriate.
3. This instruction must be appropriately modified if there is a dispute as to whether any operation or treatment had been performed, or whether it had been performed by the person to, or for whom, consent had been given.

### Source and Authority

This instruction is supported by **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954).

## 15:9 AFFIRMATIVE DEFENSE—IMPLIED CONSENT BASED ON EMERGENCY

The defendant, (*name*), is not legally responsible to the plaintiff, (*name*), on (his) (her) claim of battery if the affirmative defense of implied consent based on an emergency is proved. This defense is proved if you find all of the following:

1. At the time the defendant treated the plaintiff, the defendant reasonably believed the plaintiff's life or health was in such danger that to delay (surgery) (treatment) would further endanger the plaintiff's life or health;

2. Under the same or similar circumstances, a reasonably careful physician would have believed the same thing; and

3. The plaintiff was in a mental or physical condition that prevented (him) (her) from being able to indicate (his) (her) consent or lack of consent.

### Notes on Use

1. Note 2 of the Notes on Use to Instruction 15:2 is also applicable to this instruction.

2. Use whichever parenthesized words are most appropriate.

3. The rule stated in this instruction applies to claims based on lack of "informed consent" (Instruction 15:10) and battery claims generally, but not to other malpractice claims.

4. In cases governed by section 13-21-108, C.R.S. ("Good Samaritan" statute), or any similar statute, an instruction based on the particular statute should be given in lieu of this instruction. In certain cases, however, it is possible that both a statute and the rule stated in this instruction may be applicable.

5. The rule of this instruction does not apply if the physician knows or reasonably should have known the patient would not have consented to the operation or treatment had the patient been in a position to indicate his or her desires. See RESTATEMENT (SECOND) OF TORTS § 892D (1979).

6. This instruction must be appropriately modified if another person

was authorized by the plaintiff or by operation of law to give or withhold consent on the plaintiff's behalf in such circumstances.

### Source and Authority

This instruction is supported by **Blackman v. Rifkin**, 759 P.2d 54 (Colo. App. 1988) (citing with approval prior version of this instruction). See also RESTATEMENT § 892D.



**C. UNINFORMED CONSENT****15:10 UNINFORMED CONSENT—ELEMENTS OF LIABILITY**

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on *(his)* *(her)* claim of negligence based on lack of informed consent, you must find all of the following have been proved by a preponderance of the evidence:

1. The defendant *(insert an appropriate description of the procedure, treatment, surgery, tests, etc., that the plaintiff claims the defendant performed or prescribed)* *(on)* *(for)* the plaintiff;

2. The defendant negligently failed to obtain the plaintiff's informed consent before *(insert appropriate description of procedure, etc., as above)*;

3. A reasonable person in the same or similar circumstances as the plaintiff would not have consented to *(insert appropriate description)* had *(he)* *(she)* been given the information required for informed consent; and

4. The defendant's negligent failure caused the plaintiff *(additional)* *(injuries)* *(damages)* *(losses)*.

If you find that any one or more of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, *(then your verdict must be for the plaintiff)* *(then you must consider the defendant's affirmative defense(s) of [insert any affirmative defense that would be a complete defense to plaintiff's claim])*.

If you find that *(this affirmative defense has)* *(any one or more of these affirmative defenses have)* been

**proved by a preponderance of the evidence, then your verdict must be for the defendant.**

**However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.**

#### Notes on Use

1. Omit any numbered paragraphs, the facts of which are not in dispute.

2. Use whichever parenthesized words are most appropriate and omit the last two paragraphs if the defendant has put no affirmative defense in issue or there is insufficient evidence to support any defense.

3. Although mitigation of damages is an affirmative defense, *see* Instruction 5:2, only rarely, if ever, will it be a complete defense. For this reason, mitigation should not be identified as an affirmative defense in the concluding paragraphs of this instruction. Instead, if supported by sufficient evidence, Instruction 5:2 should be given along with the actual damages instruction appropriate to the claim and the evidence in the case.

4. In cases involving multiple defendants or designated nonparties where the pro rata liability statute, § 13-21-111.5, C.R.S., is applicable, see the Notes on Use to Instruction 4:20.

5. Note 2 of the Notes on Use to Instruction 15:2 is also applicable to this instruction. Whenever this instruction is given, Instruction 15:11 and, if otherwise applicable, Instructions 15:12 and 15:13 must also be given. For the general definition of “negligence” as used in this instruction, use the first paragraph of Instruction 15:2. The applicable standard for determining such negligence, “national” or “local,” is covered in Instruction 15:11.

6. The appropriate instruction relating to causation in Chapter 9 should also be given with this instruction.

7. “The law in Colorado distinguishes between an action based on no consent (battery) [Instructions 15:7-15:9] and one based on lack of informed consent [Instructions 15:10-15:13].” **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo. App. 1983), *rev’d on other grounds*, 704 P.2d 317 (Colo. 1985); *see also* **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Eslander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995). Consequently, if the plaintiff is making a claim only on the basis of the lack of “informed consent,” the instructions in subpart C of this Part I should be used. If the plaintiff is making a claim on the basis of no consent as

well as one on the basis of lack of “informed consent” (and there is sufficient evidence supporting each claim), applicable instructions in subparts B and C of this Part I should be given, appropriately modified as may be necessary.

8. The third numbered paragraph of the instruction incorporates an objective standard; however, subjective testimony of what the patient would have done is some evidence of what a reasonable person in the patient’s position would have done. **Holley v. Huang**, 284 P.3d 81 (Colo. App. 2011).

9. When supported by sufficient evidence, Instruction 15:9 (emergencies) should be given with this instruction.

10. If the defense of contributory negligence has been properly raised, the numbered paragraphs of this instruction should be substituted for the numbered paragraphs in Instruction 9:22, and that instruction should then be used in accord with its Notes on Use.

11. With regard to electroconvulsive treatment, an appropriate instruction based on sections 13-20-401 to -403, C.R.S., should be used rather than this instruction.

### Source and Authority

1. This instruction is supported by **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997); **Mallett v. Pirkey**, 171 Colo. 271, 466 P.2d 466 (1970); **Short v. Downs**, 36 Colo. App. 109, 537 P.2d 754 (1975); **Martin v. Bralliar**, 36 Colo. App. 254, 540 P.2d 1118 (1975) (disclosure of general risks does not discharge the duty to disclose substantial or specific risks); and **Stauffer v. Karabin**, 30 Colo. App. 357, 492 P.2d 862 (1971) (citing with approval what is now the third paragraph of Instruction 15:11; once there is evidence that the patient was uninformed when “consent” was given due to a failure to disclose, the physician must go forward with evidence showing that the failure to disclose conformed with community standards or, if applicable, national standards). *See also* **Mudd v. Dorr**, 40 Colo. App. 74, 574 P.2d 97 (1977).

2. Generally, it is the treating physician or surgeon and not a hospital that has the legal obligation to obtain the informed consent of the patient prior to surgery. **Krane v. Saint Anthony Hosp. Sys.**, 738 P.2d 75 (Colo. App. 1987). *See* **Garhart v. Columbia/HealthONE, L.L.C.**, 95 P.3d 571 (Colo. 2004) (generally, doctor has duty to obtain patient’s informed consent to perform proposed medical procedure, and hospital presented sufficient evidence to show that doctors were negligent in failing to inform plaintiff of risks associated with vaginal delivery).

3. A health care facility does not owe a duty to obtain a patient’s informed consent even if it knew or should have known of the treating physician’s propensity for not obtaining informed consent from his



patients. **Smith v. Surgery Center at Lone Tree, LLC**, 2020 COA 145M, ¶ 30, 484 P.3d 745, 753. A health care facility does not assume a shared duty with the patient's treating physician to obtain the patient's informed consent to use a particular drug by placing the drug on its formulary and making it available for use. *Id.* at ¶ 32, 484 P.3d at 754. A health care facility does not assume a duty to obtain the patient's informed consent by furnishing its consent forms for use. *Id.* at ¶¶ 35–37, 484 P.3d at 755.

4. A claim for lack of informed consent is based on information communicated by a physician to a patient before treatment is commenced and, in the absence of a significant change in the patient's condition that would cause a risk to become substantial, a physician has no duty to continue warning the patient during the course of that treatment. However, where a new, previously undisclosed and substantial risk arises during the course of medical treatment, there may be an additional duty on the part of the physician to warn the patient of that risk. **Gorab**, 943 P.2d at 430.

5. "Informed consent claims typically arise out of a substantial risk associated with a competently performed procedure." **Hall v. Frankel**, 190 P.3d 852, 864 (Colo. App. 2008). For purposes of informed consent, a physician has no duty to disclose risks of diagnostic errors or the availability of other procedures that the physician has determined are not medically indicated, as those kinds of errors are adequately covered by claims of negligence. *Id.* (claims for failure to properly diagnose or to order appropriate tests are generally litigated under negligence theory). See Instructions 15:2 and 15:3.

6. Although doctors typically obtain their patients' consent in writing, "[a] doctor may employ any means of communication—such as conversation, writings, video, and audio recordings, or some combination of these—that will yield a properly informed consent." **Holley**, 284 P.3d at 83; see **Maercklein v. Smith**, 129 Colo. 72, 266 P.2d 1095 (1954).

**15:11 INFORMATION REQUIRED**

**A physician must obtain the patient's informed consent before (treating) (operating on) (or) (performing a procedure on) the patient.**

**For a patient's consent to be an informed consent, a physician must have informed the patient of the following:**

- 1. The nature of the (illness) (injury) (or) (medical condition);**
- 2. The nature of the (operation) (procedure) (or) (treatment);**
- 3. The alternative treatments available, if any; and**
- 4. The substantial risks, if any, involved in undergoing the (operation) (procedure) (or) (treatment), and the substantial risks, if any, of the alternative treatments.**

**A physician must inform a patient of the above (insert number) items to the extent a reasonable physician practicing in the same field of practice (as a general practitioner in the same or similar locality) (as a specialist), at the same time, would have under the same or similar circumstances. The failure to do so is negligence.**

**Notes on Use**

1. See the Notes on Use to Instruction 15:10.
2. The last paragraph of Instruction 15:8 may be given with this instruction to explain what is meant by "express or implied" consent.
3. Use whichever parenthesized words are appropriate. In the last paragraph, if there is a dispute as to which standard is applicable in light of the evidence in the case, both parenthetical clauses should be given in the alternative, with another instruction, based on the first clause of the first paragraph of Instruction 15:3, explaining to the jury

how they should determine whether the defendant should be considered a “general practitioner” or a “specialist.” Expert testimony is necessary to establish the precise scope of a physician’s duty of disclosure, and therefore, a claim based on lack of informed consent is properly dismissed where plaintiff fails to file a certificate of review pursuant to section 13-20-602, C.R.S. **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995); *see also* **Williams v. Boyle**, 72 P.3d 392 (Colo. App. 2003).

4. If numbered paragraph 4 of this instruction is given, Instruction 15:12, defining “substantial risk,” must also be given.

### Source and Authority

1. This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982); and **Miller v. Van Newkirk**, 628 P.2d 143 (Colo. App. 1980).

2. If the plaintiff shows that a physician failed to inform of any risks of a medical procedure, that element of a prima facie case is met, and the burden shifts to the defendant to establish that nondisclosure conformed to the applicable standard. **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997). However, if the plaintiff claims that the disclosure was simply incomplete or that a specific risk was assessed incorrectly, then the plaintiff has the burden of showing that the specific risk was substantial and should have been disclosed in conformity with the applicable standard. **Williams**, 72 P.3d at 399.



**15:12 SUBSTANTIAL RISK—DEFINED**

A substantial risk is one that a physician knows or that a reasonably careful physician should know would be important to the patient in deciding whether to submit to a particular (operation) (treatment) (or) (procedure).

**Notes on Use**

1. This instruction must be given whenever numbered paragraph 4 of Instruction 15:11 is given.
2. Use whichever parenthesized words are appropriate.

**Source and Authority**

This instruction is supported by **Bloskas v. Murray**, 646 P.2d 907 (Colo. 1982). *See also* **Gorab v. Zook**, 943 P.2d 423, 427 (Colo. 1997) (recognizing that a substantial risk is “one that would be medically significant to the patient’s decision, and the risk is known or ought to be known by the physician”).

## 15:13 PROOF OF NEGLIGENT FAILURE TO OBTAIN INFORMED CONSENT

If you find the defendant, (name), (insert appropriate description of the procedure, etc., as in numbered paragraph 1 of Instruction 15:10), (on) (for) the plaintiff, (name), and the plaintiff had (injuries) (damages) (losses) because of a risk associated with that (insert appropriate description, e.g., “treatment,” “procedure,” “test,” etc.), and the defendant did not inform the plaintiff of that risk, then you must find that the defendant negligently failed to obtain the plaintiff’s informed consent.

### Notes on Use

1. This instruction should not be given unless (1) there is sufficient evidence of the basic facts on which the mandatory inference of negligence depends, and (2) there is no or insufficient evidence in the case rebutting that same inference. If there is sufficient evidence rebutting the inference of negligence in not obtaining the plaintiff’s informed consent, that is, the burden of going forward with the evidence has been met, this instruction should not be given. The reason for not giving the instruction in the latter circumstance is that the rule set out in the instruction functions in the same manner as a presumption that shifts only a burden of going forward with the evidence and that “disappears” from the case if there is sufficient evidence in the case rebutting the “inferred” or “presumed” fact of negligence. See Source and Authority to Instruction 15:10; Notes on Use to Instruction 3:5 (discussing procedural effects of such presumptions).

2. “The law in Colorado distinguishes between an action based on no consent (battery) [Instructions 15:7-15:9] and one based on lack of informed consent [Instructions 15:10-15:13].” **Blades v. DaFoe**, 666 P.2d 1126, 1129 (Colo. App. 1983), *rev’d on other grounds*, 704 P.2d 317 (Colo. 1985); see also **Espander v. Cramer**, 903 P.2d 1171 (Colo. App. 1995). This Instruction 15:13, therefore, should not be given in conjunction with Instruction 15:7, but rather should be given only with Instruction 15:10 when otherwise appropriate.

3. For a discussion of the shifting burdens of proof involved in a claim for lack of informed consent, see **Gorab v. Zook**, 943 P.2d 423 (Colo. 1997).

### Source and Authority

This instruction is supported by **Gorab**, 943 P.2d at 427. See also

Blades, 666 P.2d at 1129-30; Source and Authority to Instruction 15:10.



**D. DAMAGES INSTRUCTIONS AND SPECIAL  
VERDICTS IN ACTIONS AGAINST HEALTH CARE  
PROFESSIONALS OR HEALTH CARE  
INSTITUTIONS**

**15:14 SPECIAL VERDICT—MECHANICS FOR  
SUBMITTING—TORT ACTIONS AGAINST  
HEALTH CARE PROFESSIONALS OR  
HEALTH CARE INSTITUTIONS**

**You are instructed to answer the following questions. You must all agree on your answers to each question for which an answer is required:**

- 1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)?**
- 2. Was the defendant, *(name of first or only defendant)*, negligent?**
- 3. Was the negligence, if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**
- 4. Was the defendant, *(name of second defendant)*, negligent?**
- 5. Was the negligence, if any, of the defendant, *(name of second defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?**

**If you find that the plaintiff, *(name)*, did not have (injuries) (damages) (losses), or if you find that (the defendant was not) (none of the defendants were) negligent or that no negligence (of the defendant) (of any of the defendants) was a cause of any of the plaintiff's claimed (injuries) (damages) (losses), then your foreperson shall complete only Special Verdict Form A and he or she and all jurors will sign it.**

**On the other hand, if you find that the plaintiff did have (injuries) (damages) (losses) and you further**

find that (the defendant) (one or more of the defendants) was negligent and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then on Special Verdict Form B you shall answer questions 1 through *(insert the figure "3" or "5" depending on whether there is one defendant or there are two defendants)* as well as the following questions, and your foreperson shall complete only Special Verdict Form B, and he or she and all jurors will sign it.

6. Was *(name or other appropriate description of designated nonparty)* negligent or at fault?

7. Was the negligence or fault, if any, of *(name or other appropriate description of designated nonparty)* a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff?

8. Was the plaintiff, *(name)*, negligent?

9. Was the negligence, if any, of the plaintiff a cause of (his) (her) own claimed (injuries) (damages) (losses)?

10. and 11. State your answers to numbered questions 10 and 11 as they appear on Special Verdict Form B relating to the damages the plaintiff had that were caused by the negligence of the (defendant) (one or more of the defendants) and the negligence, if any, of the plaintiff and of the nonparty, *(name or other appropriate description)*.

12. Taking as 100 percent the combined negligence or fault of all parties and the nonparty you find were negligent or at fault and whose negligence or fault was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence or fault, if any, was that of the defendant, *(name of first or only defendant)*, of the defendant, *(name of second defendant)*, of the plaintiff, *(name)*, and of the nonparty, *(name or other appropriate description)*?

**You must enter the figure of zero, “0,” for the nonparty and any party you decide was not negligent or at fault or whose negligence or fault you decide was not a cause of any of the plaintiff’s (injuries) (damages) (losses).**

### Notes on Use

1. Under the Health Care Availability Act (HCAA), the instructions in this subpart D, if otherwise applicable, should be used in “any civil action for damages in tort brought against a [licensed] health care professional or [licensed and certified] health care institution.” § 13-64-203, C.R.S. For the definitions of these persons and institutions, see section 13-64-202(3) and (4), C.R.S. *See also* **Scholz v. Metro. Pathologists, P.C.**, 851 P.2d 901 (Colo. 1993) (unlicensed, nonprofessional lab employee of “health care professional” was covered by HCAA), *superseded in part by* § 13-64-302(2), C.R.S.; **Chavez v. Parkview Episcopal Med. Ctr.**, 32 P.3d 609 (Colo. App. 2001) (cap on noneconomic damages under section 13-64-302(1), not applicable to manufacturer of health care equipment); *cf.* **Moffett v. Life Care Ctrs. of Am.**, 187 P.3d 1140 (Colo. App. 2008) (under durable power-of-attorney statute and definition of “medical treatment,” § 15-14-505(7), C.R.S., decision to admit patient to nursing home constitutes “medical treatment decision”), *aff’d on other grounds*, 219 P.3d 1068 (Colo. 2009).

2. This instruction and Instruction 15:15, which must be given with this instruction, have been drafted to cover what are likely to be the most extensive, yet typical, circumstances to which they might apply. These instructions, therefore, must be appropriately modified in any of the following circumstances:

- a. There is sufficient evidence that the tort involved is one other than malpractice in the form of professional negligence, e.g., battery;
- b. There is more than one plaintiff;
- c. There is only one defendant or more than two defendants;
- d. No defense of contributory negligence has been raised or there is insufficient evidence to support the defense;
- e. No nonparty has been designated under the provisions of section 13-21-111.5(3)(b), C.R.S., or there is no or insufficient evidence of any tortious conduct on the part of a properly designated nonparty or that such conduct was a cause of any of the plaintiff’s claimed injuries; or
- f. The claim against one or more defendants is based only on the vicarious liability of that defendant for the tortious



conduct of another defendant or person who has not been joined as a party.

3. When appropriate to the evidence in the case, Instructions 15:16 and 15:17 should also be given with this instruction.

4. Use whichever parenthesized words and phrases are appropriate.

5. If this instruction is otherwise applicable, none of the instructions in Chapter 9 concerning comparative negligence or several liability should be given except that, if otherwise appropriate, Instructions 9:28 (comparative negligence) and 9:24 (affirmative defense—negligence or fault of designated nonparty) should be given with this instruction.

6. This instruction has been drafted to allow the court to apply the limitations on damages set out in section 13-64-302, and also the limitations set in section 13-21-102.5, C.R.S., to the extent those limitations may be applicable in cases in which the acts or omissions occurred before July 1, 2003. For that reason, when otherwise applicable, this instruction should be used rather than Instruction 6:1A. *See also Preston v. Dupont*, 35 P.3d 433 (Colo. 2001) (damages for physical impairment or disfigurement are not precluded by HCAA, and are not subject to cap on noneconomic damages; this latter holding was legislatively overruled by § 13-64-302(1)(b) for acts or omissions occurring after July 1, 2003); *Chavez*, 32 P.3d at 612-13 (noneconomic damages award against hospital should not be reduced to statutory limit for health care institutions before apportioning damages between hospital and defendant that was not health care professional or institution).

7. Delete any reference to Question 11 if there is insufficient evidence of any future damages. *See Wallbank v. Rothenberg*, 74 P.3d 413 (Colo. App. 2003) (award of future medical expenses must be based upon substantial evidence that establishes reasonable probability that such expenses will necessarily be incurred); *see also Ochoa v. Vered*, 212 P.3d 963 (Colo. App. 2009) (trial court did not abuse discretion in remitting damages awarded for plaintiff's future medical expenses).

8. Insert in this instruction and Instruction 15:15 any other questions that may be necessary to resolve properly any other claims of the plaintiff or affirmative defenses of any of the defendants.

9. For special procedural and substantive limitations that are, or may be, applicable when a claim for punitive damages is based on a negligence claim against a "health care professional," see section 13-64-302.5, C.R.S., and *Sheron v. Lutheran Medical Center*, 18 P.3d 796 (Colo. App. 2000) (under statute, request for punitive damages may not be included in initial claim for relief, though after parties have substantially completed discovery, plaintiff may amend pleadings to assert claim, provided plaintiff establishes prima facie proof of triable issue). To the extent any provisions of this section are applicable, ap-

propriate modifications may be required in this instruction. *See, e.g.*, § 13-64-302.5(4), (5). The legislature has made it clear that noneconomic damages and, therefore, any limitation on them, do not include punitive damages. § 13-64-302(1)(a)(I).

### Source and Authority

1. This instruction is supported by sections 13-64-203 to -205, C.R.S. *See also* § 13-64-102(2), C.R.S. (legislative declaration); **HealthONE v. Rodriguez**, 50 P.3d 879 (Colo. 2002); **Preston**, 35 P.3d at 438; and **Garhart v. Columbia/HealthONE L.L.C.**, 168 P.3d 512 (Colo. App. 2007).

2. The damages caps imposed by the HCAA apply to any prefiling prejudgment interest to which the plaintiff would be entitled. § 13-64-302(2) (legislatively overruling, in part, **Scholz**, 851 P.2d 901); **Morris v. Goodwin**, 185 P.3d 777 (Colo. 2008); **Wallbank**, 74 P.3d at 420. Prejudgment interest is to be calculated on the amount of the reduced award, after application of any HCAA damages caps, regardless of the amount awarded by the jury. **Morris**, 185 P.3d at 780.

3. For a discussion of the constitutionality of the HCAA, see **Garhart v. Columbia/HealthONE, L.L.C.**, 95 P.3d 571 (Colo. 2004) (reaffirming **Scholz**, rejecting various constitutional attacks, and upholding constitutionality of damages cap); **Rodriguez**, 50 P.3d at 896 (HCAA section barring incapacitated person from electing to receive lump-sum payment of future damages did not violate equal protection); **Scholz**, 851 P.2d at 907 (upholding constitutionality of damages cap).

4. Under section 13-64-207(1), C.R.S., the trial court has discretion in determining the form and distribution of periodic payments. **Rodriguez**, 50 P.3d at 896; **Garhart**, 168 P.3d at 518.

**15:15 SPECIAL VERDICT FORMS—TORT ACTIONS  
AGAINST HEALTH CARE  
PROFESSIONALS OR HEALTH CARE  
INSTITUTIONS—FORMS A AND B**

**FORM A**

**IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_**

_____	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>SPECIAL VERDICT</b>
_____	)	<b>FORM A</b>
<b>Defendant(s).</b>	)	

**DO NOT ANSWER THIS SPECIAL VERDICT FORM A  
IF YOUR FOREPERSON HAS COMPLETED SPECIAL  
VERDICT FORM B AND ALL JURORS HAVE SIGNED  
IT.**

**We, the jury, present our Answers to Questions  
submitted by the Court, to which we have all agreed:**

**1. Did the plaintiff, (*name*), have (injuries) (dam-  
ages) (losses)? (Yes or No)**

**ANSWER:\_\_\_\_\_**

**2. Was the defendant, (*name of first or only defen-  
dant*), negligent? (Yes or No)**

**ANSWER:\_\_\_\_\_**

**3. Was the negligence, if any, of the defendant,  
(*name of first or only defendant*), a cause of any of the  
(injuries) (damages) (losses) claimed by the plaintiff?  
(Yes or No)**

**ANSWER:\_\_\_\_\_**



4. Was the defendant, (name of second defendant), negligent? (Yes or No)

ANSWER:\_\_\_\_\_

5. Was the negligence, if any, of the defendant, (name of second defendant), a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER:\_\_\_\_\_

We, the jury, find for the defendant(s) and award no damages to the plaintiff, (name).

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ Foreperson

FORM B

IN THE \_\_\_\_\_ COURT IN AND FOR THE  
COUNTY OF \_\_\_\_\_, STATE OF COLORADO  
Civil Action No. \_\_\_\_\_

\_\_\_\_\_  
Plaintiff,  
v. \_\_\_\_\_  
Defendant(s). )  
 )  
 )  
 )  
 ) SPECIAL VERDICT  
 ) FORM B  
 )  
 )

DO NOT ANSWER THIS SPECIAL VERDICT FORM B IF YOUR FOREPERSON HAS COMPLETED SPECIAL VERDICT FORM A AND ALL JURORS HAVE SIGNED IT.

We, the jury, present our Answers to Questions submitted by the Court, to which we have all agreed:

1. Did the plaintiff, *(name)*, have (injuries) (damages) (losses)? (Yes or No)

ANSWER:\_\_\_\_\_

2. Was the defendant, *(name of first or only defendant)*, negligent? (Yes or No)

ANSWER:\_\_\_\_\_

3. Was the negligence, if any, of the defendant, *(name of first or only defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER:\_\_\_\_\_

4. Was the defendant, *(name of second defendant)*, negligent? (Yes or No)

ANSWER:\_\_\_\_\_

5. Was the negligence, if any, of the defendant, *(name of second defendant)*, a cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER:\_\_\_\_\_

If you find that the plaintiff did have (injuries) (damages) (losses), and you further find that (the defendant) (one or more of the defendants) was negligent, and that such negligence was a cause of any of the plaintiff's (injuries) (damages) (losses), then answer the following questions:

6. Was *(name or other appropriate description of designated nonparty)* negligent or at fault? (Yes or No)

ANSWER:\_\_\_\_\_

7. Was the negligence or fault, if any, of *(name or other appropriate description of designated nonparty)* a

cause of any of the (injuries) (damages) (losses) claimed by the plaintiff? (Yes or No)

ANSWER:\_\_\_\_\_

8. Was the plaintiff, (name), negligent? (Yes or No)

ANSWER:\_\_\_\_\_

9. Was the negligence, if any, of the plaintiff a cause of (his) (her) claimed (injuries) (damages) (losses)? (Yes or No)

ANSWER:\_\_\_\_\_

State your answers to the following questions numbered 10 and 11 relating to the damages the plaintiff had that were caused by the negligence of the (plaintiff) (defendant) (one or more of the defendants) and the negligence, if any, of the nonparty (name or other appropriate description):

10. Damages to the present: What is the total amount of (injuries) (damages) (losses) that the plaintiff has had to the present in each of the following categories? Enter the figure zero, "0," for any category if you determine there were no (injuries) (damages) (losses) in that category.

- a. Medical and other health care expenses: \$\_\_\_\_\_
- b. Lost earnings (and lost earning capacity): \$\_\_\_\_\_
- c. Other economic losses than those included immediately above in a. and b.: \$\_\_\_\_\_
- d. Non-economic losses, including pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and (insert any other recoverable non-economic loss of which there is sufficient evidence): \$\_\_\_\_\_



**11. Future damages:** What is the present value of the total amount of (injuries) (damages) (losses) that the plaintiff will probably have in the future in each of the following categories? Enter the figure zero, "0," for any category, if you determine that the plaintiff will probably have no future (injuries) (damages) (losses) in that category. For each category in which you determine the plaintiff will probably have future (injuries) (damages) (losses), you must also indicate the period of time that plaintiff will probably have those future (injuries) (damages) (losses).

- a. Medical and other health care expenses: \$ \_\_\_\_\_  
 Duration of injuries, damages, losses: From \_\_\_\_\_ To \_\_\_\_\_
- b. Lost earnings (and lost earning capacity): \$ \_\_\_\_\_  
 Duration of injuries, damages, losses: From \_\_\_\_\_ To \_\_\_\_\_
- c. Other economic losses than those included immediately above in a. and b.: \$ \_\_\_\_\_  
 Duration of injuries, damages, losses: From \_\_\_\_\_ To \_\_\_\_\_
- d. Non-economic losses, including pain and suffering, inconvenience, emotional stress, impairment of the quality of life, and (insert any other recoverable non-economic loss of which there is sufficient evidence): \$ \_\_\_\_\_  
 Duration of injuries, damages, losses: From \_\_\_\_\_ To \_\_\_\_\_

**12. Taking as 100 percent the combined negligence or fault of all parties and the nonparty you find were negligent or at fault and whose negligence or fault was a cause of any of the plaintiff's (injuries) (damages) (losses), what percentage of negligence or fault, if any, was that of the defendant, (name of first or only defendant), of the defendant, (name of second defendant), of the plaintiff, (name), and of the nonparty, (name or other appropriate description)?**

You must enter the figure of zero, "0," for the nonparty and any party you decide was not negligent or at fault or whose negligence or fault you decide was not a cause of any of the plaintiff's (injuries) (damages) (losses).

ANSWER: \_\_\_\_\_

Percentage charged to (name of first or only defendant): \_\_\_\_\_%

Percentage charged to (name of second defendant): \_\_\_\_\_%

Percentage charged to (name or other appropriate description of nonparty): \_\_\_\_\_%

Percentage charged to (name of plaintiff): \_\_\_\_\_%

MUST TOTAL: 100% \_\_\_\_\_%

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**Foreperson**

### Notes on Use

1. The Notes on Use to Instruction 15:14 also apply to this instruction.

2. Use whichever parenthesized words are appropriate.

3. Delete any category of damages if there is insufficient evidence of any damages in that category. See **Wallbank v. Rothenberg**, 74 P.3d 413 (Colo. App. 2003) (award of future medical expenses must be based upon substantial evidence that establishes reasonable probability that such expenses will necessarily be incurred).

### Source and Authority

1. This instruction is supported by sections 13-64-204 and 13-64-205(1)(d), C.R.S.; **HealthONE v. Rodriguez**, 50 P.3d 879 (Colo. 2002); **Preston v. Dupont**, 35 P.3d 433 (Colo. 2001); and **Garhart v. Columbia/HealthONE L.L.C.**, 168 P.3d 512 (Colo. App. 2007).

2. As to how the court should use the various findings of the jury, see sections 13-21-102.5, and 13-64-201 to -213, C.R.S. As to the limita-

tions on the total damages for personal injuries in actions against a health care professional or institution, see section 13-64-302(1)(b), C.R.S. In addition, as to limitations on the recovery of damages for noneconomic loss or injury in cases in which the acts or omissions occurred before July 1, 2003, see section 13-21-102.5(3)(a). For the limitations on such damages both before and after that date in actions involving “medical malpractice,” see also sections 13-64-102 and 13-64-302(1).

3. The Health Care Availability Act (HCAA) contains several caps on damages. Recovery against all health care professionals and institutions, as defined in the statute, is limited to a total of \$1.0 million, including punitive damages. §§ 13-64-202(6), 13-64-302(1)(b), C.R.S. Within the \$1.0 million limit, noneconomic losses, including physical impairment and disfigurement damages, are subject to a limit of \$300,000. §§ 13-64-102(2)(b), 13-64-302(1)(b) & (c), C.R.S. However, the court may enter judgment in excess of the \$1.0 million recovery cap upon good cause shown, as detailed in the statute—that is, if the present value of past and future economic damages would exceed the limitations, such that it would be unfair to limit a plaintiff’s recovery. § 13-64-302(1)(b); *see also* **Pressey v. Children’s Hosp. Colo.**, 2017 COA 28, ¶ 10, 488 P.3d 151; **Vitetta v. Corrigan**, 240 P.3d 322 (Colo. App. 2009); **Wallbank v. Rothenberg**, 140 P.3d 177 (Colo. App. 2006) (decided under former version of statute). Any prefiling prejudgment interest, which begins when the action accrues and ends when the lawsuit is filed, is subject to the \$1.0 million and \$300,000 limits. § 13-64-302(2); **Ochoa v. Vered**, 212 P.3d 963 (Colo. App. 2009); **Wallbank**, 74 P.3d at 419.

4. Unlike the statutory caps on recovery of tort damages generally and for wrongful death, the caps under the HCAA are not adjusted for inflation. § 13-64-302; *see also* 7 JOHN W. GRUND, ET AL., COLO. PRAC. SERIES: PERSONAL INJURY PRACTICE—TORTS AND INSURANCE § 21.37 (3d ed. 2012).

5. Although the jury will issue its findings, the HCAA requires that a plaintiff prove both that good cause exists to support such an award, and that applying the total damages limit under the Act would be unfair. § 13-64-302(1)(b); **Vitetta**, 240 P.3d at 329; **Wallbank**, 140 P.3d at 179 (decided under former version of statute). This statute does not specify what factors a trial court should consider in assessing whether a plaintiff has met the burden of proving “good cause” and “unfairness,” and the trial court must exercise discretion in considering the totality of the circumstances, i.e., those factors that it deems relevant under the circumstances of any particular case. **Wallbank**, 140 P.3d at 180-81 (trial court did not abuse discretion in considering relevant factors not expressly specified in the statute); **Vitetta**, 240 P.3d at 329 (“In making findings as to ‘good cause’ and ‘unfairness’ (which essentially are different ways of saying the same thing), trial courts must consider the ‘totality of circumstances.’”). However, “the contract exception to the collateral source statute, § 13-21-111.6, is applicable in post-verdict



proceedings to reduce damages . . . under the HCAA,” and the court should not consider “Medicaid payments (and private insurance) in determining whether to exceed the HCAA’s \$1,000,000 limitation on damages.” **Pressey**, 2017 COA 28, ¶ 22.

6. In **Garhart v. Columbia/HealthONE, L.L.C.**, 95 P.3d 571 (Colo. 2004), the supreme court held that the HCAA allows a total recovery of the cap amount against all defendants, and that statutory cap applies to both defendants and designated nonparty health care tortfeasors; thus, a trial court must first apply the HCAA cap to the jury’s noneconomic damages award, and then apportion those damages according to the jury’s allocation of fault among any health care defendants and nonparty tortfeasors. For a case involving apportionment among health care tortfeasors and non-health care tortfeasors, see **Chavez v. Parkview Episcopal Medical Center**, 32 P. 3d 609 (Colo. App. 2001).

## 15:16 DETERMINING PRESENT VALUE OF FUTURE DAMAGES

If you determine the plaintiff, (*name*), will probably have future damages in any one or more of the categories set out in Question 11 of Special Verdict Form B, then the amount of any damages you determine for each category must be stated in terms of its “present value.”

To state any future damages in any category in terms of their present value, you must:

1. Determine the total damages for the (injuries) (damages) (losses) the plaintiff will have in each category in the future, for the period of time plaintiff will probably have those (injuries) (damages) (losses); and
2. Discount the damages in each category to today's value, using a reasonable commercial rate.

### Notes on Use

1. This instruction must be given with Instructions 15:14 and 15:15 whenever those instructions are given and any category of future damages is included in Question 11 of Instruction 15:15.
2. Use whichever parenthesized words are appropriate.

### Source and Authority

1. This instruction is supported by section 13-64-202(7), C.R.S. (defining “present value” applicable when jury determines future damages under section 13-64-205(1)(d), C.R.S.). See **Garhart v. Columbia/HealthONE, L.L.C.**, 168 P.3d 512 (Colo. App. 2007); **Dupont v. Preston**, 9 P.3d 1193 (Colo. App. 2000) (section 13-64-205(1)(d) mandates that all future damages be discounted to present value), *aff'd on other grounds*, 35 P.3d 433 (Colo. 2001). In **Garhart**, 168 P.3d at 517–18, the court upheld an order requiring the future payments to be funded with the full amount of the jury's calculation of the present value, and not with an annuity in a lesser amount that defendant's expert projected would pay out plaintiff's gross future damages. See also **Brady v. Burlington N. R.R.**, 752 P.2d 592 (Colo. App. 1988) (discussing the various methods of calculating present value in the context of a FELA case, and recognizing the propriety of including an adjustment for inflation when determining total future damages, if there is sufficient evidence of an appropriate inflation rate). Expert testimony is not required to determine present value. **Dupont**, 9 P.3d at 1200.

2. The Health Care Availability Act provides that, if a plaintiff's future damages exceed \$150,000, the award "be paid by periodic payments rather than by a lump-sum payment." § 13-64-203(1), C.R.S. However, some plaintiffs could "elect to receive the immediate payment of the present value of the future damage award in a lump-sum amount in lieu of periodic payments" under certain circumstances outlined in section 13-64-205(1)(f), C.R.S. See also **Vitetta v. Corrigan**, 240 P.3d 322 (Colo. App. 2009).



**15:17 DETERMINING LIFELONG FUTURE  
DAMAGES—SHORTENED LIFE  
EXPECTANCY**

If you determine that the plaintiff's, (*name's*), life expectancy has been shortened because of the negligence or fault, if any, of (one or more of) the defendant(s), (*name[s]*), and that the plaintiff will probably have future damages in any one or more of the categories set out in Question 11 of Special Verdict Form B, and that those damages will probably continue until the end of (his) (her) life, then in determining the amount of damages in any category, you must apply the following rule(s):

(1. Any damages for lost earnings or earning capacity are to be calculated on the basis of what the plaintiff would or could probably have earned had [he] [she] not been injured by the negligence or fault of [one or more of] the defendant[s]); (and)

(2. Any damages for [medical and other health care expenses] [or] [other economic losses than medical and health care expenses] [or] [any noneconomic losses] are to be calculated on the basis of what the plaintiff's shortened life expectancy is now).

**Notes on Use**

1. When appropriate to the evidence in the case, this instruction should be given with Instructions 15:19 and 15:20, using whichever parenthesized and bracketed portions are appropriate.

2. If there is sufficient evidence that the tort involved is other than malpractice in the form of a professional negligence, e.g., battery, this instruction must be appropriately modified.

**Source and Authority**

This instruction is supported by section 13-64-204(2), C.R.S (setting out life expectancy rules).

## II. ATTORNEYS—MALPRACTICE

### 15:18 ELEMENTS OF LIABILITY OF ATTORNEYS— NOT INVOLVING AN UNDERLYING CLAIM OR CASE

Use Instruction 9:1 or 9:22, whichever is appropriate in light of the evidence in the case.

#### Notes on Use

1. When there is sufficient evidence supporting a claim for malpractice based on negligence against an attorney, Instruction 9:1 or 9:22 and Instruction 15:21 should be given, together with such other instructions contained in this Chapter, as well as such other instructions in Chapter 9 as would be appropriate in light of the evidence in the case. *See Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005) (to establish legal malpractice claim, plaintiff must prove that: (1) the attorney owed a duty of care to the plaintiff; (2) the attorney breached that duty; and (3) damages to the plaintiff were proximately caused by the attorney's breach of duty); *Stone v. Satriana*, 41 P.3d 705 (Colo. 2002) (same); *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶ 27, 412 P.3d 751 (same); *Schultz v. Stanton*, 198 P.3d 1253 (Colo. App. 2009) (same), *aff'd on other grounds*, 222 P.3d 303 (Colo. 2010); *Luttgen v. Fischer*, 107 P.3d 1152 (Colo. App. 2005) (same). For a discussion as to the distinctions between legal malpractice claims based on (1) breach of contract, (2) breach of fiduciary duty, and (3) negligence, see *General Steel Domestic Sales, LLC v. Hogan & Hartson, LLP*, 230 P.3d 1275 (Colo. App. 2010) (discussing contract and negligence claims); *Aller v. Law Office of Carole C. Schrieffer, P.C.*, 140 P.3d 23 (Colo. App. 2005) (discussing latter two claims); *Smith v. Mehaffy*, 30 P.3d 727 (Colo. App. 2000) (discussing all three claims). The court of appeals has also discussed the distinction between what must be proven to establish a claim for legal malpractice and a claim against an attorney for aiding and abetting a non-client's breach of fiduciary duty, see *Anstine v. Alexander*, 128 P.3d 249 (Colo. App. 2005), *vacated in part and rev'd in part on other grounds*, 152 P.3d 497 (Colo. 2007); however, any precedential value of that discussion is questionable because the supreme court vacated that portion of the lower court opinion that addressed the latter claim.

2. This instruction should not be used when the claim against the attorney involves the handling of an underlying matter that can be characterized as a "case within a case." For such situations, Instructions 15:19 and 15:20 should be used.

#### Source and Authority

1. Use of Instruction 9:1 or 9:22 is supported by *Fleming v. Lentz*,

**Evans, & King, P.C.**, 873 P.2d 38 (Colo. App. 1994); and **McCafferty v. Musat**, 817 P.2d 1039 (Colo. App. 1990).

### Standard of Care

2. An attorney owes a client a duty to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in representing the client. **Hopp & Flesch, LLC v. Backstreet**, 123 P.3d 1176 (Colo. 2005); **Rantz**, 109 P.3d at 139; **Stone**, 41 P.3d at 712; **Bebo Constr. Co. v. Mattox & O'Brien, P.C.**, 990 P.2d 78 (Colo. 1999); **Anstine**, 128 P.3d at 255; **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App. 2000).

### Attorney-Client Relationship

3. Generally, there can be no legal malpractice claim without an attorney-client relationship. **Allen v. Steele**, 252 P.3d 476 (Colo. 2011); **Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.**, 892 P.2d 230 (Colo. 1995), as a non-client has no standing to maintain a legal malpractice action. *See, e.g.*, **Brown v. Silvern**, 45 P.3d 749 (Colo. App. 2001) (an attorney who ceased to represent client and was replaced by other counsel before statute of limitations had run on client's action could not be held liable for failing to timely file action); **Peltz v. Shidler**, 952 P.2d 793 (Colo. App. 1997) (client, who filed petition in bankruptcy was not "real party in interest" in legal malpractice action and, therefore, lacked standing to bring action); **Gavend v. Malman**, 946 P.2d 558 (Colo. App. 1997) (same); **Glover v. Southard**, 894 P.2d 21, 24 (Colo. App. 1994) (a nonclient/testamentary beneficiary has no standing to bring a malpractice claim for attorney's "alleged negligence in drafting a valid testamentary instrument so long as the document accurately reflects the testator's intent"); **Shriners Hosp. for Crippled Children, Inc. v. Southard**, 892 P.2d 417 (Colo. App. 1994); **Hill v. Boatright**, 890 P.2d 180 (Colo. App. 1994) (plaintiff, in her capacity as beneficiary of the estate, as distinct from her capacity as personal representative, had no standing to bring claim of legal malpractice against attorney who assisted personal representative in sale of property owned by estate), *aff'd in part, rev'd in part on other grounds sub nom. Boatright v. Derr*, 919 P.2d 221 (Colo. 1996); **Klancke v. Smith**, 829 P.2d 464 (Colo. App. 1991) (decendent's children had no attorney-client relationship with attorney who distributed wrongful death proceeds to decendent's spouse and had no duty to ensure that proceeds were shared with or paid to children).

4. The attorney-client relationship involves a fiduciary relationship as a matter of law. **Accident & Injury Med. Specialists, P.C. v. Mintz**, 2012 CO 50, ¶ 25, 279 P.3d 658; **Olsen & Brown v. City of Englewood**, 889 P.2d 673 (Colo. 1995). Nonetheless, where the same operative facts support claims for both legal malpractice and breach of fiduciary duty, the latter claim should be dismissed as duplicative. **Aller**, 140 P.3d at 27; **Moguls of Aspen, Inc. v. Faegre & Benson**, 956 P.2d 618 (Colo. App. 1997). The court of appeals has held that when



different facts support each theory, recovery may be allowed for each. **Boyd**, 9 P.3d at 1163 (permitting separate claims for professional negligence and for breach of fiduciary duty where claims were based on different factual allegations); **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008) (discussing as different claim, one defendant attorney's failure to aid former client after she was charged with criminal fraud for transaction in which she claimed he advised her). The court of appeals clarified that "where . . . an attorney makes a decision based on professional judgment pertaining to the representation of a client, the cause of action is indistinguishable from one for professional negligence." **Aller**, 140 P.3d at 28 (suggesting that an independent claim for breach of fiduciary duty is not apt to survive absent allegations of "an intentional tort or a breach of trust involving matters of moral turpitude"). In **Hartman v. Community Responsibility Center, Inc.**, 87 P.3d 202 (Colo. App. 2003), a case that did not involve an attorney-client relationship, the court of appeals noted another important distinction between claims for breach of fiduciary duty and those for malpractice: in a professional negligence claim, the standards of care involved are established by expert witnesses, while the nature and scope of the duties owed by a fiduciary are issues of law to be determined by the court.

5. A law firm does not owe a fiduciary duty to a client to disclose information related to an attorney's past disciplinary history, mental illness, alcoholism, or arrests where such problems did not materially affect the attorney's performance. **Moye White LLP v. Beren**, 2013 COA 89, ¶¶ 26-29, 320 P.3d 373.

6. An attorney-client relationship is based on contract that may be express or implied by the conduct of the parties. **Turkey Creek, LLC v. Rosania**, 953 P.2d 1306 (Colo. App. 1998); **Klancke**, 829 P.2d at 466. Irrespective of whether an attorney-client relationship is express or implied, the parties must agree on all essential contractual terms. **Schmidt v. Frankewich**, 819 P.2d 1074 (Colo. App. 1991). If the parties fail to agree on sufficiently definite and certain terms, no valid agreement is formed. *Id.* The payment of attorney fees on behalf of a client, does not, in and of itself, establish an attorney-client relationship. **Turkey Creek, LLC**, 953 P.2d at 1312. To establish an attorney-client relationship by the conduct of the parties, it must be shown that the person sought and received legal advice from the attorney concerning the legal consequences of that person's past or contemplated action. *Id.*

7. Where the client is a business entity, the attorney-client relationship is typically considered to be between the attorney and the entity and not the entity's individual members. **Zimmerman v. Dan Kamphausen Co.**, 971 P.2d 236 (Colo. App. 1998) (when attorney represents partnership, attorney does not necessarily have attorney-client relationship with each of the partners); **Turkey Creek, LLC**, 953 P.2d at 1311 (no attorney-client relationship existed between joint venturer and attorneys for co-venturer); **Schmidt**, 819 P.2d at 1079 (attorneys for corporation could not be held liable to shareholders asserting third-party beneficiary claim).

### Liability to Non-Clients

8. A non-client may assert a claim against an attorney only in limited circumstances: when the attorney's conduct is alleged to have been willful and wanton, fraudulent or malicious, **Allen**, 252 P.3d at 482; **Mehaffy, Rider, Windholz & Wilson**, 892 P.2d at 235; **Turman v. Castle Law Firm, LLC**, 129 P.3d 1103 (Colo. App. 2006); **Zimmerman**, 971 P.2d at 242; **Holmes v. Young**, 885 P.2d 305 (Colo. App. 1994), or when the claim is for negligent misrepresentation, **Allen**, 252 P.3d at 482; **Mehaffy, Rider, Windholz & Wilson**, 892 P.2d at 236; **Zimmerman**, 971 P.2d at 242. *See also* **Mintz**, 2012 CO 50, ¶ 32 (holding that an attorney did not owe fiduciary duty to non-client third parties who were entitled to funds from the Colorado Lawyer Trust Account Foundation trust accounts); **State Farm Fire & Cas. Co. v. Weiss**, 194 P.3d 1063 (Colo. App. 2008) (equitable subrogation claim of insurer based on alleged attorney malpractice in representation of insured properly dismissed on public-policy grounds).

9. In **Baker v. Wood, Ris & Hames, P.C.**, 2016 CO 5, ¶ 35, 364 P.3d 872, 879, and **Bewley v. Semler**, 2018 CO 79, ¶ 25, 432 P.3d 582, 588, the supreme court affirmed the strict privity rule that “an attorney’s liability to a non-client is limited to the narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation.” In **Baker**, the court concluded that dissatisfied beneficiaries of a testator’s estate (non-clients) did not have standing to bring legal malpractice or contract claims against the attorney who drafted the testator’s estate planning documents because of the strict privity rule. 2016 CO 5, ¶¶ 1–2, 364 P.3d at 874. In **Bewley**, the court concluded that a member of the condominium association (a non-client) who was a third-party beneficiary to the agreement between the condominium association and the law firm could not bring a breach of contract claim against the law firm because of the strict privity rule. 2018 CO 79, ¶¶ 25, 30, 432 P.3d at 588–89.

10. The supreme court has “save[d] for another day the question of whether an attorney can ever be liable for aiding and abetting a breach of fiduciary duty to a non-client.” **Alexander v. Anstine**, 152 P.3d 497, 503 (Colo. 2007). In **Anstine**, 128 P.3d at 255, the court of appeals upheld a finding that attorneys who were found not to have been professionally negligent with respect to their corporate client could nonetheless be held liable for aiding and abetting the breach of fiduciary duty that the client’s president owed to the corporation; “the attorneys could conceivably fulfill their duty to their client . . . while lending assistance to and aiding and abetting the president’s breach of a separate duty to [the corporation] and to third parties,” even though the only client to whom the attorneys owed any professional duty was the corporation. As noted above, however, because the supreme court vacated that portion of the **Anstine** opinion, the lower court’s decision on this issue is not binding precedent. *But see* **Holmes**, 885 P.2d at 308-09 (suggesting that an attorney could be liable for aiding and abetting in breach of fiduciary



duty); **Semler v. Hellerstein**, 2016 COA 143, ¶ 41, 428 P.3d 555 (plaintiffs aiding and abetting breach of fiduciary duty claim against a lawyer failed as a matter of law because the client did not owe fiduciary duty to the plaintiff), *rev'd on other grounds sub nom.* **Bewley v. Semler**, 2018 CO 79, 432 P.3d 582.

11. A litigation privilege protects a lawyer from civil liability for statements made in the course of a judicial proceeding if the statements are related to the litigation. See **Begley v. Ireson**, 2017 COA 3, ¶ 13, 399 P.3d 777; **Buckhannon v. U.S. W. Commc'ns, Inc.**, 928 P.2d 1331 (Colo. App. 1996); **Club Valencia Homeowners Ass'n v. Valencia Assocs.**, 712 P.2d 1024 (Colo. App. 1985). However, only a qualified litigation privilege applies to prelitigation statements. For a litigation privilege to apply to an attorney's prelitigation statement, the prelitigation statement must be (1) related to prospective litigation, and (2) the prospective litigation must be contemplated in good faith. **Begley**, 2017 COA 3, ¶ 17; see also **Merrick v. Burns, Wall, Smith & Mueller, P.C.**, 43 P.3d 712 (Colo. App. 2001).

### Causation

12. In **Boulders at Escalante LLC**, 2015 COA 85, ¶ 35, the court of appeals held that "not every legal malpractice case requires proof of a case within a case" to establish causation. "[W]hen the injury claimed does not depend on the merits of the underlying action or matter, the plaintiff does not need to prove a case within a case." *Id.* at ¶ 49. "Rather, the plaintiff must prove that the attorney's negligent acts or omissions caused him or her to suffer some financial loss or harm by applying the generally applicable test for cause in fact in negligence actions; that the plaintiff would not have suffered the harm but for the attorney's negligence." *Id.*; see also Source and Authority for Instruction 15:19.

13. In those cases where a plaintiff need not prove a case-within-a-case, causation requires two distinct determinations: (1) whether the attorney's negligence was the actual cause (cause in fact) of the plaintiff's injury; and (2) whether the attorney's negligence was the proximate cause (legal cause) of the plaintiff's injury. **Froid v. Zacheis**, 2021 COA 74, ¶ 31. "The test for causation in fact is the 'but for' test — whether, but for the attorney's alleged negligence, the harm would not have occurred." *Id.* at ¶ 32. "The test for proximate cause is whether 'a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct.'" *Id.* ¶ 34 (quoting **Vanderbeek v. Vernon Corp.**, 50 P.3d 866, 872 (Colo. 2002)).

### Damages

14. To prevail on a legal malpractice claim, a plaintiff must prove that he or she suffered damages because of an attorney's negligence.



**Froid**, 2021 COA 74, ¶ 39. Damages must be proven with “reasonable certainty.” *Id.* “ ‘Reasonable certainty’ does not mean ‘mathematical certainty,’ but the plaintiff ‘must prove the fact of damage and provide evidence sufficient to allow a reasonable estimate of the loss sustained.’ ” *Id.* (quoting **Hoff & Leigh, Inc. v. Byler**, 62 P.3d 1077, 1079 (Colo. App. 2002)).

15. Damages for emotional distress or other noneconomic damages resulting solely from pecuniary loss are not recoverable in a legal malpractice action based on negligence. **Aller**, 140 P.3d at 26-30; **Gavend**, 946 P.2d 562-63; *see also* **Froid**, 2021 COA 74, ¶ 24 (stating that “Colorado follows the rule ‘that damages for emotional injuries are not recoverable if they are a *consequence* of other damages caused by the attorney’s negligence or a fiduciary breach that was not an intentional tort’ ” (quoting 3 Ronald E. Mallen, *Legal Malpractice* § 21:19, Westlaw (2021 ed. database updated Jan. 2021))).

### Colorado Consumer Protection Act

16. In **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006), the supreme court held that attorneys may be held liable for violations of the Colorado Consumer Protection Act (CCPA) where a plaintiff shows that an attorney or law firm knowingly engaged in a deceptive trade practice that occurred in the course of the attorney’s or firm’s business, that significantly impacted the public as actual or potential consumers of legal services, and that caused an injury in fact to some legally protected interest of the plaintiff. *Id.* The enhanced damages available act as an incentive for the injured party and as a deterrent to fraudulent behavior. *Id.* Further, the court held that there was no conflict between the CCPA and the Rules of Professional Conduct in the type of conduct that they proscribe, and that the CCPA complements rather than contradicts, the court’s implementation of professional rules. *Id.* Where an attorney’s conduct is proven to constitute a violation of the CCPA, attorney fees may be recovered, § 6-1-113(2)(b), C.R.S., and if “bad faith conduct” is established by clear and convincing evidence, treble damages may also be awarded. § 6-1-113(2). The CCPA defines “bad faith conduct” as “fraudulent, willful, knowing, or intentional conduct that causes injury.” § 6-1-113(2.3).

### Statute of Limitations

17. For a discussion as to when the statute of limitations commences to run in a legal malpractice action, see **Morrison v. Goff**, 91 P.3d 1050 (Colo. 2004); **Torrez v. Edwards**, 107 P.3d 1110 (Colo. App. 2004); and **Broker House International, Ltd. v. Bendelow**, 952 P.2d 860 (Colo. App. 1998). *See also* **Allen**, 203 P.3d at 557; **Peltz**, 952 P.2d at 796; **Gavend**, 946 P.2d at 563. In **Morrison**, 91 P.3d 1050, the supreme court held that a criminal defendant must file and preserve any legal malpractice claim by filing it within the two-year statute of limitations even though the criminal defendant may still be pursuing an appeal of the underlying conviction or seeking other post-conviction

relief; however, the court did indicate that the claimant could seek a stay of the civil action until the criminal case was resolved. *But see Wallin v. McCabe*, 293 P.3d 81 (Colo. App. 2011) (trial court did not err in denying motion to stay civil case pending resolution of post-conviction motion where plaintiff did not make specific showing of hardship, delays, or prejudice).

**15:19 ELEMENTS OF LIABILITY OF ATTORNEYS—  
INVOLVING AN UNDERLYING MATTER  
(CASE-WITHIN-A-CASE)**

For the plaintiff, (*name*), to recover from the defendant, (*name*), on (his) (her) (its) claim of negligence, you must find that all of the following have been proved by a preponderance of the evidence:

1. The plaintiff should have prevailed (in the underlying case) (on the underlying claim);
2. The plaintiff did not prevail because the defendant was negligent in handling that matter; and
3. The defendant's negligence caused the plaintiff to have (injuries) (damages) (losses).

If you find that any one or more of these (*number*) statements, or any part of them, has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these (*number*) statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of [*insert any affirmative defense that would be a complete defense to plaintiff's claim*]).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

**Notes on Use**

1. When this instruction is used, Instructions 15:20 and 15:21 must also be given.



2. Use whichever parenthesized words and phrases are appropriate.

3. In cases alleging transactional malpractice against attorneys, the Committee recommends that Instruction 15:27 be considered and, if necessary, modified to fit the circumstances of the case. In **Gibbons v. Ludlow**, 2013 CO 49, ¶ 16, 304 P.3d 239, the supreme court, borrowing from the “case-within-a-case” framework applicable to legal malpractice cases, held that to establish causation against a transactional broker, a plaintiff must prove that, but for the broker’s negligence, he or she either (1) would have been able to obtain a better deal in the underlying transaction; or (2) would have been better off by walking away from the underlying transaction. *See also Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶ 46, 412 P.3d 751 (stating that the case within a case framework applies to legal malpractice actions when the claimed injury relates to an unfavorable business transaction).

### Source and Authority

1. This instruction is supported by **Rantz v. Kaufman**, 109 P.3d 132 (Colo. 2005); **Bebo Construction Co. v. Mattox & O’Brien, P.C.**, 990 P.2d 78 (Colo. 1999); **Allen v. Martin**, 203 P.3d 546 (Colo. App. 2008); **Bristol Co. v. Osman**, 190 P.3d 752 (Colo. App. 2007); **Giron v. Koltavy**, 124 P.3d 821 (Colo. App. 2005); **Luttgen v. Fischer**, 107 P.3d 1152 (Colo. App. 2005); **Brown v. Silvern**, 45 P.3d 749 (Colo. App. 2001); **Tripp v. Borchard**, 29 P.3d 345 (Colo. App. 2001); and **Miller v. Byrne**, 916 P.2d 566 (Colo. App. 1995).

2. Proof of negligence and causation in a legal malpractice claim arising out of an underlying case or claim requires proof that the plaintiff should have prevailed in the underlying claim. **Stanton v. Schultz**, 222 P.3d 303 (Colo. 2010); **Rantz**, 109 P.3d at 136; **Bebo Constr. Co.**, 990 P.2d at 83; **Allen**, 203 P.3d at 557; **Giron**, 124 P.3d at 824; **Luttgen**, 107 P.3d at 1154; **Brown**, 45 P.3d at 751; **Fleming v. Lentz, Evans, & King, P.C.**, 873 P.2d 38 (Colo. App. 1994); **McCafferty v. Musat**, 817 P.2d 1039 (Colo. App. 1990). To establish proximate cause, plaintiff must show, first, that the injury would not have occurred but for the attorney’s actions, and second, that the claim underlying the malpractice action should have been successful if the attorney had acted in accordance with his or her duty. **Stanton**, 222 P.3d at 307; **Rantz**, 109 P.3d at 136; **Bristol Co.**, 190 P.3d at 755; **Brown**, 45 P.3d at 751; *see Allen v. Law Office of Carole C. Schriefer, PC*, 140 P.3d 23 (Colo. App. 2005) (plaintiff’s damages claim failed where settled underlying matter and attorney’s conduct did not cause her any pecuniary loss as matter of law). Accordingly, in order to determine whether the plaintiff should have prevailed on the underlying claim, “the case-within-a-case,” the jury must also be instructed on the law applicable to the underlying claim. **Miller**, 916 P.2d at 579.

3. In the event that the plaintiff did prevail in the underlying matter, and the plaintiff’s claim concerns the limited nature of the plaintiff’s

success in the earlier case or claim, then this instruction should be modified accordingly. This instruction should also be used, with appropriate modification, in situations where the underlying case settled, but the plaintiff alleges that the settlement was as a result of the attorney's negligence. See **White v. Jungbauer**, 128 P.3d 263 (Colo. App. 2005) (notwithstanding public policy considerations encouraging settlement, litigant may bring legal malpractice suit against his or her attorney even though underlying action settled); cf. **Crowe v. Tull**, 126 P.3d 196 (Colo. 2006) (client claiming that law firm engaged in false or misleading advertising to public and that it relied for its profitability on quick settlements of cases with minimal expenditure of effort and resources, constituting illegal scheme perpetrated on public, sufficiently alleged claim under Colorado Consumer Protection Act, and Act's application did not conflict with Rules of Professional Conduct).

4. For a discussion of when a plaintiff must prove “a case within a case” in legal malpractice cases, see **Boulders at Escalante LLC**, 2015 COA 85, ¶¶ 36-49. There, the Colorado Court of Appeals explained that “[t]he case within a case requirement makes eminent sense when the claimed injury relates to the lawyer’s representation of a client in litigation.” *Id.* at ¶ 45. Specifically, “[w]hen the lawyer acts negligently with respect to the litigation, the only way to determine if the negligence caused the harm claimed by the client is to compare what actually happened with what would have happened had the negligence not occurred: the case within a case requirement.” *Id.* However, “when the injury claimed does not depend on the merits of the underlying action or matter, the plaintiff does not need to prove a case within a case.” *Id.* at ¶ 49.

**15:20 ELEMENTS OF LIABILITY OF ATTORNEYS—  
INVOLVING AN UNDERLYING MATTER  
(CASE-WITHIN-A-CASE)—DETERMINING  
WHETHER PLAINTIFF SHOULD HAVE  
PREVAILED IN THE UNDERLYING  
MATTER**

**In determining whether the plaintiff should have prevailed (in the underlying case) (on the underlying claim), you must follow instructions A through \_\_\_\_ attached to this instruction.**

*(Attach all instructions that defendant, if he or she had acted in accordance with his or her duty, should have asserted, including theories of liability. Also attach instructions concerning defenses available, comparative fault and nonparty fault, causation, the measure of damages, and any other instructions that should have been given in the underlying matter).*

**Notes on Use**

1. This instruction should usually be given with Instruction 15:19 when the malpractice asserted is negligence in handling an underlying claim or case. *But see Allen v. Martin*, 203 P.3d 546 (Colo. App. 2008) (in malpractice action following underlying guilty plea, as to claim for breach of fiduciary duty against former counsel, necessary evidence for causation would have included expert testimony regarding how prosecutor likely would have responded had counsel responded differently).

2. To determine whether the plaintiff should have prevailed on the underlying claim, “the case-within-a-case,” the jury must also be instructed on the law applicable to the underlying claim. Accordingly, a separate set of instructions concerning the underlying case or claim must be given to the jury. *Miller v. Byrne*, 916 P.2d 566 (Colo. App. 1995); *see also* R. MALLIN, *LEGAL MALPRACTICE* § 37:153 (2018).

3. The goal of trying the case-within-a-case is to decide what the result of the underlying proceeding or matter should have been according to an objective standard. Recreating the underlying matter generally requires calling and examining those persons who would have been witnesses and presenting the demonstrative and documentary evidence that would have been presented but for the attorney’s negligence. *See* *LEGAL MALPRACTICE*, *supra*, § 37:87. However, where legal questions are central to the underlying case, expert testimony may well be required to establish causation. *Allen*, 203 P.3d at 569.



4. “[P]roving the case within a case in an attorney malpractice suit includes resolving the question of whether the judgment in the underlying case would have been collectible.” **LeHouillier v. Gallegos**, 2019 CO 8, ¶ 20, 434 P.3d 156, 160 (citing **Lawson v. Sigfrid**, 83 Colo. 116, 262 P. 1018 (1927)). The supreme court held that because “the collectibility of the underlying judgment is essential to the causation and damages elements of a client’s professional negligence claim against her attorney, . . . the client-plaintiff bears the burden to prove that the underlying judgment was collectible.” *Id.* at ¶ 22, 434 P.3d at 160.

#### Source and Authority

This instruction is supported by **Miller**, 916 P.2d at 573.

## 15:21 NEGLIGENCE—ATTORNEYS—DEFINED

An attorney is negligent when (he) (she) (does an act that reasonably careful attorneys would not do) (or) (fails to do an act that reasonably careful attorneys would do).

To determine whether an attorney's conduct is negligent, you must compare that conduct with what an attorney, having and using that knowledge and skill of attorneys practicing law at the same time, would or would not have done under the same or similar circumstances.

### Notes on Use

1. This instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:1, 9:22, or 15:19, whichever is appropriate, when there is sufficient evidence that the defendant, while acting as an attorney, may have been negligent, and that negligence may have caused the plaintiff compensable harm.
2. Use whichever parenthesized words and phrases are appropriate.

### Source and Authority

1. This instruction is supported by **Stone v. Satriana**, 41 P.3d 705 (Colo. 2002); **Bebo Construction Co. v. Mattox & O'Brien, P.C.**, 990 P.2d 78 (Colo. 1999); **Aller v. Law Office of Carole C. Schriefer, PC**, 140 P.3d 23 (Colo. App. 2005); **Boyd v. Garvert**, 9 P.3d 1161 (Colo. App. 2000); **Fleming v. Lentz, Evans, & King, P.C.**, 873 P.2d 38 (Colo. App. 1994); **Temple Hoyne Buell Foundation v. Holland & Hart**, 851 P.2d 192 (Colo. App. 1992); **McCafferty v. Musat**, 817 P.2d 1039 (Colo. App. 1990); **Boigegrain v. Gilbert**, 784 P.2d 849 (Colo. App. 1989); and **Myers v. Beem**, 712 P.2d 1092 (Colo. App. 1985).

2. The provisions of sections 13-20-601 and 13-20-602, C.R.S., requiring that a "certificate of review" be filed in negligence actions against licensed professionals, are not limited to negligence claims; rather, they are implicated in every claim against such professionals that requires the use of expert testimony to establish the applicable standard of professional care. **Redden v. SCI Colo. Funeral Servs., Inc.**, 38 P.3d 75 (Colo. 2001); **RMB Servs., Inc. v. Truhlar**, 151 P.3d 673 (Colo. App. 2006); **Baumgarten v. Coppage**, 15 P.3d 304 (Colo. App. 2000). Therefore, some breach of fiduciary duty and breach of contract claims against professionals may require the filing of a certificate of review. **Martinez v. Badis**, 842 P.2d 245 (Colo. 1992); **Ehrlich Feedlot, Inc. v. Oldenburg**, 140 P.3d 265 (Colo. App. 2006); **Kelton v.**

**Ramsey**, 961 P.2d 569 (Colo. App. 1998); **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996); **Crystal Homes, Inc. v. Radetsky**, 895 P.2d 1179 (Colo. App. 1995). Where expert testimony is required to establish a claim of professional liability against an attorney based on negligent misrepresentation, a certificate of review is required. **RMB Servs.**, 151 P.3d at 676–77.

3. The filing of a certificate of review is not a jurisdictional requirement. **Miller v. Rowtech, LLC**, 3 P.3d 492 (Colo. App. 2000). However, because expert testimony is necessary in all but the clearest of legal malpractice cases to establish the standards of acceptable professional conduct, see **Hice v. Lott**, 223 P.3d 139 (Colo. App. 2009); **Giron v. Koktavy**, 124 P.3d 821 (Colo. App. 2005); **Kelton**, 961 P.2d at 571; **Boigegrain**, 784 P.2d at 850, a plaintiff's failure to file a certificate of review may result in dismissal of the case. **Kelton**, 961 P.2d at 571; **Rosenberg v. Grady**, 843 P.2d 25 (Colo. App. 1992). A claimant is not required to file separate certificates of review for an attorney and his law firm. **RMB Servs.**, 151 P.3d at 676 (single certificate as to both satisfied statutory requirement). A plaintiff is not required to file a certificate of review when alleging that an attorney failed to file an action within the applicable statute of limitations or to show the existence of an attorney-client relationship. **Giron**, 124 P.3d at 825–26.

4. A claim for negligent misrepresentation stated against an attorney by a non-client is not a claim for professional negligence. See **Allen v. Steele**, 252 P.3d 476 (Colo. 2011); **Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.**, 892 P.2d 230 (Colo. 1995) (attorney may be liable to one other than his or her client for tort of negligent misrepresentation only when attorney knows or should reasonably foresee that the third person will rely on information provided by attorney). Accordingly, this instruction should not be given in that situation. See Instruction 9:4 and the Notes on Use to that instruction. An attorney does not owe any duty to non-clients to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the profession. **Allen**, 252 P.3d at 482; **Mehaffy, Rider, Windholz & Wilson**, 892 P.2d at 240; **Anstine v. Alexander**, 128 P.3d 249 (Colo. App. 2005), *vacated in part and rev'd in part on other grounds*, 152 P.3d 497 (Colo. 2007).



## 15:22 NO IMPLIED WARRANTY OF SUCCESSFUL OUTCOME

(Unless the attorney states or agrees otherwise, an) (An) attorney does not guarantee or promise success simply by agreeing to provide professional services.

(An unsuccessful outcome does not, by itself, mean that an attorney was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that an attorney was negligent.)

### Notes on Use

1. Use whichever parenthetical words are appropriate.
2. This cautionary instruction is comparable to the rule that the happening of an accident is not alone sufficient to presume negligence, see Instruction 9:12, and may be given in conjunction with Instruction 15:21 when the evidence of malpractice includes lack of success.
3. If there is sufficient evidence that the defendant may have warranted or promised success, instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, such as legal malpractice, depending on the evidence in the case.

### Source and Authority

1. This instruction is supported by **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996) (dicta); and **Myers v. Beem**, 712 P.2d 1092 (Colo. App. 1985) (making a mistake is not necessarily negligence).
2. The fact that the client ultimately prevailed in litigation concerning a document drafted by the lawyer does not mean that the lawyer cannot be held liable for professional malpractice. "One . . . obligation [an attorney owes his or her client] is anticipating reasonably foreseeable risks." **Temple Hoyne Buell Found. v. Holland & Hart**, 851 P.2d 192, 198 (Colo. App. 1992); see also **First Interstate Bank of Denver, N.A. v. Berenbaum**, 872 P.2d 1297 (Colo. App. 1993).

## 15:23 REFERRAL OF CLIENT TO ANOTHER ATTORNEY

An attorney who refers a client to another attorney for legal services is not responsible for any negligence on the part of the other attorney. However, a referring attorney who fails to exercise reasonable care in selecting another attorney may be held responsible for (his) (her) own negligence.

### Notes on Use

1. The Notes on Use to Instruction 15:5 are also applicable to this instruction.
2. Use whichever parenthesized word is appropriate.

### Source and Authority

There appear to be no Colorado cases specifically establishing the rule stated in this instruction. There are, however, cases involving physicians that support it. *See* Source and Authority to Instruction 15:5.

## 15:24 CONTRIBUTORY NEGLIGENCE OF CLIENT—DEFINED

A client is negligent when the client fails to do an act that a reasonably careful person would do or does an act that a reasonably careful person would not do under the same or similar circumstances to protect (himself) (herself) (itself) from (new) (or) (additional) (injuries) (damages) (losses).

### Notes on Use

1. Use whichever parenthetical words are appropriate.

2. When there is sufficient evidence that a client may have been negligent, but negligent only with regard to the services being rendered by the defendant (for example, the failure of a client to make a timely return of signed documents after having been properly instructed and warned), then this instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:22 or Instructions 15:19 and 15:20. On the other hand, if there is sufficient evidence of the plaintiff's possible contributory negligence relating to other matters, then Instruction 9:6, rather than this instruction, should be used in conjunction with Instruction 9:22. However, in either event, for the doctrine of contributory or comparative negligence to apply, the client's alleged negligence must be causally related or linked to the attorney's representation. **Smith v. Mehaffy**, 30 P.3d 727 (Colo. App. 2000) (conduct of client that occurred before client had consulted defendant attorney could not provide basis for comparative negligence defense in legal malpractice action); **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996) (plaintiff employer's failure to obtain workers' compensation insurance did not support comparative negligence instruction where defendants knew that plaintiff was uninsured before they agreed to represent plaintiff in workers' compensation proceedings).

3. In some cases, it may be difficult to determine whether a failure on a plaintiff's part to do something in relation to the matters about which the plaintiff has sought professional services should be viewed as a matter of contributory negligence (to be governed by this instruction and Instruction 9:22, and the appropriate comparative negligence instructions in Chapter 9), or as a matter of failure to mitigate damages to be governed by Instruction 5:2. If necessary, the court by special instructions, or through the use of special interrogatories, should identify the specific damages being claimed by the plaintiff that may be subject to the rules of comparative negligence and those that may be subject to the rules of mitigation of damages. In general, mitigation relates to additional damages that are caused by the failure of the plaintiff to take reasonable steps to minimize or reduce the extent of damages



caused by a prior-occurring negligent act of another. *See* Instruction 5:2. Contributory negligence, on the other hand, usually means negligent conduct on the plaintiff's part that joins with the defendant's negligent conduct to cause the plaintiff's initial injuries or losses or that joins with the defendant's subsequent negligent conduct to increase the plaintiff's injuries or losses. *See* Instruction 9:6.

### Source and Authority

1. This instruction is supported by **Scognamillo v. Olsen**, 795 P.2d 1357 (Colo. App. 1990); **Smith**, 30 P.3d at 731 (Colorado has recognized the defense of comparative negligence in legal malpractice claims where the client's alleged negligence must have related both to the injury alleged to have been caused by the attorney's negligence and to the attorney's representation); and **McLister**, 934 P.2d at 846 (same).

2. For a discussion of the failure of a patient to follow a physician's advice as constituting contributory negligence, see **McGraw v. Kerr**, 23 Colo. App. 163, 128 P. 870 (1912). *See also* **Hanley v. Spencer**, 108 Colo. 184, 115 P.2d 399 (1941); **Pearson v. Norman**, 106 Colo. 396, 106 P.2d 361 (1940); **Scognamillo**, 795 P.2d at 1363 (jury could reasonably infer that client's failure to settle case resulted in part from client's own negligence); Source and Authority to Instruction 9:6.

### III. OTHER PROFESSIONAL MALPRACTICE (ACCOUNTANTS, ARCHITECTS, ETC.)

#### 15:25 ELEMENTS OF LIABILITY—ACCOUNTANTS, ARCHITECTS, ETC.

Use Instruction 9:1 or 9:22, whichever is appropriate in light of the evidence in the case.

##### Notes on Use

1. See Notes on Use for Instruction 15:18.

2. When there is sufficient evidence of a claim for relief for malpractice based on negligence against a practitioner of a profession, for example, an architect or accountant, Instruction 9:1 or 9:22 and Instruction 15:26 should be given, together with any other instructions contained in Chapter 9 and in Chapter 15, as would be appropriate in light of the evidence in the case. *See, e.g., Gibbons v. Ludlow*, 2013 CO 49, ¶¶ 12–17, 304 P.3d 239 (noting similarity of elements of negligence and professional negligence); *Scognamillo v. Olsen*, 795 P.2d 1357 (Colo. App. 1990) (rejecting defendants' arguments that legal malpractice action was different from other negligence cases and required a causation instruction different from Instruction 9:28).

##### Source and Authority

1. Use of Instruction 9:1 or 9:22 is supported by *Kellogg v. Pizza Oven, Inc.*, 157 Colo. 295, 402 P.2d 633 (1965) (architect); *Gibbons*, 2013 CO 49, ¶¶ 14–16 (real estate brokers); and *Rian v. Imperial Municipal Services Group, Inc.*, 768 P.2d 1260 (Colo. App. 1988) (architect).

2. There is no tort of “educational malpractice.” *Tolman v. CenCor Career Colls., Inc.*, 851 P.2d 203 (Colo. App. 1992), *aff'd on other grounds*, 868 P.2d 396 (Colo. 1994). Likewise, the supreme court has repeatedly rejected claims for clergy malpractice, although it recognizes claims against clergy and religious organizations for breach of fiduciary duty, negligent hiring, and negligent supervision. *See, e.g., Moses v. Diocese of Colo.*, 863 P.2d 310 (Colo. 1993); *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988).

3. While the Colorado Supreme Court in *Moses* and *Destefano* distinguished claims of negligence against religious leaders and organizations from claims for breach of fiduciary duty, the court of appeals held that a claim for breach of fiduciary duty was properly dismissed as duplicative of the negligence claim. *See Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618 (Colo. App. 1997); *see also Awai v. Kotin*, 872 P.2d 1332 (Colo. App. 1993) (quasi-judicial im-

munity did not protect a psychologist who, in addition to performing a court-ordered evaluation of a child and the parents, also undertook to treat the parents and was thereafter sued for negligent treatment by the child's father). However, where the claims for professional negligence and for breach of fiduciary duty are based on different factual allegations, instructions on both claims are proper. *See Boyd v. Garvert*, 9 P.3d 1161 (Colo. App. 2000). In *Hartman v. Community Responsibility Center, Inc.*, 87 P.3d 202 (Colo. App. 2003), the court of appeals noted an important distinction between claims for breach of fiduciary duty and those for malpractice: in a professional negligence claim, the standards of care involved are established by expert witnesses, while the nature and scope of the duties owed by a fiduciary are issues of law to be determined by the court.

4. For the standard of professional care required of practitioners of professions other than one of the healing arts, see Source and Authority to Instruction 15:26.



## 15:26 NEGLIGENCE—OTHER PROFESSIONALS— DEFINED

**(A) (An)** *(insert appropriate description, e.g., “architect,” “accountant,” etc.)* **is negligent when (he) (she) (does an act that reasonably careful [insert pluralized version of appropriate description, e.g., “accountants”] would not do) (or) (fails to do an act that reasonably careful [insert pluralized version of appropriate description] would do).**

**To determine whether (a) (an)** *(insert appropriate description, e.g., “architect,” “accountant,” etc.)’s conduct is negligent, you must compare that conduct with what (a) (an) (insert appropriate description, e.g., “architect,” “accountant,” etc.) having and using that knowledge and skill of (insert pluralized version of appropriate description, e.g., “architects”) practicing (insert appropriate description, e.g., “architecture,” “accountancy,” etc.), at the same time, would or would not have done under the same or similar circumstances.*

### Notes on Use

1. This instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:1 or 9:22, whichever is appropriate, when there is sufficient evidence that the defendant, while acting as a professional may have been negligent, and that negligence may have caused the plaintiff compensable harm.

2. Use whichever parenthesized words are appropriate.

### Source and Authority

1. This instruction is supported by **Wheeler & Lewis v. Slifer**, 195 Colo. 291, 577 P.2d 1092 (1978) (architect); **Kellogg v. Pizza Oven, Inc.**, 157 Colo. 295, 402 P.2d 633 (1965) (architect); **Rian v. Imperial Municipal Services Group, Inc.**, 768 P.2d 1260 (Colo. App. 1988) (architect). For a general discussion of the standard of care to be applied in negligence cases against members of a profession, see RESTATEMENT (SECOND) OF TORTS § 299A (1965).

2. The provisions of sections 13-20-60 and 13-20-602, C.R.S., requiring that a “certificate of review” be filed in negligence actions against licensed professionals are not limited to negligence claims, but rather encompass every claim against such professionals that requires the use of expert testimony to establish the applicable standard of professional

care. See **Baumgarten v. Coppage**, 15 P.3d 304 (Colo. App. 2000). Therefore, some breach of fiduciary duty and contract claims against such professionals may require the filing of a certificate of review. **Martinez v. Badis**, 842 P.2d 245 (Colo. 1992); **McLister v. Epstein & Lawrence, P.C.**, 934 P.2d 844 (Colo. App. 1996); **Crystal Homes, Inc. v. Radetsky**, 895 P.2d 1179 (Colo. App. 1995).

3. If there is competent expert testimony indicating that the standard of care established or accepted by the relevant community is itself deficient, this instruction must be modified to inform the jury that evidence of the professional's compliance with the community standard of care is some evidence that the professional was not negligent, but is not conclusive proof of his or her exercise of due care. **United Blood Servs., Inc. v. Quintana**, 827 P.2d 509 (Colo. 1992).

4. In **Corcoran v. Sanner**, 854 P.2d 1376, 1379 (Colo. App. 1993), the court rejected the "locality rule" in a malpractice suit against an architect stating that: "[a]lthough we recognize that, in certain situations, the standard of care applicable to Colorado architects may be affected by local standards, we hold that statewide standards must be applied in determining an architect's duty to his or her client and whether an architect has breached that duty."

5. In some instances, the standard of care may be established by regulatory standards. See, e.g., **Hice v. Lott**, 223 P.3d 139 (Colo. App. 2009) (observing that the Division of Real Estate adopted the Uniform Standards of Professional Appraisal Practice as generally accepted standards of professional appraisal practice).

## 15:27 CAUSATION—REAL ESTATE BROKERS— TRANSACTIONAL MALPRACTICE— DEFINED

To determine whether the defendant(s)'s negligence was a cause of the plaintiff(s)'s (injuries) (damages) (losses), you must determine whether, had the defendant(s) not been negligent, the plaintiff(s) (would have obtained a better deal in the transaction) (would have been better off by walking away from the transaction).

### Notes on Use

1. This instruction should be used in conjunction with Instruction 9:1, 9:18, 9:20, or 9:22, whichever is appropriate, when the plaintiff asserts the defendant was negligent in handling an underlying transaction.

2. Use whichever parenthesized phrases are appropriate.

3. This instruction should be given in cases involving circumstances similar to **Gibbons v. Ludlow**, 2013 CO 49, ¶ 16, 304 P.3d 239. In cases different from **Gibbons**, the last two parenthesized phrases should be modified to fit the facts of the case.

### Source and Authority

This instruction is supported by **Gibbons**, 2013 CO 49, ¶ 16. Where the claim of professional negligence against a real estate broker involves allegations of transactional malpractice, the plaintiff must prove causation by showing that, but for the broker's negligence, the plaintiff would have achieved a more favorable result in the underlying transaction. *Id.*; **Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC**, 2015 COA 85, ¶ 46, 412 P.3d 751.



**15:28 NO IMPLIED WARRANTY OF SUCCESSFUL  
OUTCOME—OTHER PROFESSIONALS**

(Unless [a] [an] *[insert appropriate description, e.g., “architect,” “accountant,” etc.]* **states or agrees otherwise, [a] [an] (A) (An) (insert appropriate description) does not guarantee or promise success simply by agreeing to provide professional services.**

(An unsuccessful outcome does not, by itself, mean that [a] [an] *[insert appropriate description, e.g., “architect,” etc.]* **was negligent.) (An exercise of judgment that results in an unsuccessful outcome does not, by itself, mean that [a] [an] *[insert appropriate description, e.g., “architect,” etc.]* was negligent.)**

**Notes on Use**

1. Use whichever parenthesized words are appropriate.
2. Omit the first parenthesized clause unless there has been some evidence that the defendant may have so stated or agreed, in which event instructions based on that contractual theory of relief should be given either in addition to, or as an alternative to, any other theories, e.g., professional negligence, depending on the evidence in the case.

**Source and Authority**

This instruction sets out the same principles that are applicable to physicians and practitioners of the other healing arts. See Instruction 15:4 and the Source and Authority to that instruction.

## 15:29 REFERRAL OF CLIENT TO ANOTHER PROFESSIONAL PERSON

**(A) (An)** (*insert appropriate description, e.g., "architect," "accountant," etc.*) **who agrees to provide professional services to a client and refers the client to another professional person for professional services is not responsible for any negligence of the other professional person, unless the person making the referral as (a) (an)** (*insert appropriate description, e.g., "architect," etc.*) **has failed to exercise reasonable care in selecting the other professional person.**

### Notes on Use

1. Use whichever parenthesized words are appropriate.
2. This instruction should not be given, or must be appropriately modified, if there is a basis in the evidence in the case for imposing liability vicariously on the professional person because the other professional person is an agent, employee, or partner, etc. In such cases, for appropriate vicarious liability instructions, see the instructions in Chapter 8.
3. If there is any other personal basis for imposing liability on the professional person making the reference, e.g., personal negligence in giving incorrect information to the other professional person, this instruction must also be appropriately modified.

### Source and Authority

There appear to be no Colorado cases specifically establishing the rule stated in this instruction. There are, however, cases from other jurisdictions. *See, e.g.,* W.R. Habeeb, Annotation, *Liability of One Physician or Surgeon for Malpractice of Another*, 85 A.L.R.2d 889 (1962).

## 15:30 CONTRIBUTORY NEGLIGENCE OF CLIENT—DEFINED

**A client is negligent when the client fails to do an act that a reasonably careful person would do or does an act that a reasonably careful person would not do under the same or similar circumstances to protect (himself) (herself) (itself) from (new) (or) (additional) (injuries) (damages) (losses).**

### Notes on Use

1. Use whichever parenthetical words are appropriate.
2. When there is sufficient evidence that a client may have been negligent, but negligent only with regard to the services being rendered by the defendant, for example, the failure of a client to make a timely return of signed documents after having been properly instructed and warned, then this instruction, rather than Instruction 9:6, should be used in conjunction with Instruction 9:22. On the other hand, if there is sufficient evidence of the plaintiff's possible contributory negligence relating to other matters, then Instruction 9:6, rather than this instruction, should be used in conjunction with Instruction 9:22.
3. In some cases, it may be difficult to determine whether a failure on a plaintiff's part to do something in relation to the matters about which the plaintiff has sought professional services should be viewed as a matter of contributory negligence, to be governed by this instruction, Instruction 9:22, and the appropriate comparative negligence instructions, *see* Chapter 9, or as a matter of failure to mitigate damages, to be governed by Instruction 5:2. If necessary, the court by special instructions, or through the use of special interrogatories, should identify the specific damages being claimed by the plaintiff that may be subject to the rules of comparative negligence and those that may be subject to the rules of mitigation of damages. In general, mitigation relates to additional damages that are caused by the failure of the plaintiff to take reasonable steps to minimize or reduce the extent of damages caused by a prior occurring negligent act of another. *See* Instruction 5:2. Contributory negligence, on the other hand, usually means negligent conduct on the plaintiff's part that joins with the defendant's negligent conduct to cause the plaintiff's initial injuries or losses, or that joins with the defendant's subsequent negligent conduct to increase the plaintiff's injuries or losses. *See* Instruction 9:6.

### Source and Authority

This instruction is supported by **McGraw v. Kerr**, 23 Colo. App. 163, 128 P. 870 (1912) (discussing the failure of a patient to follow a



physician's advice as constituting contributory negligence). *See also* **Hanley v. Spencer**, 108 Colo. 184, 115 P.2d 399 (1941); **Pearson v. Norman**, 106 Colo. 396, 106 P.2d 361 (1940); Source and Authority to Instruction 9:6.























ISBN 978-1-731-92620-3



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